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Supreme Court, U.S.
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No. 07-

In the
Supreme Court of the United States

United States of America
Respondent-Appellee,
v.
TERRY YOUNG,
Petitioner-Appellant.

On Petition for Writ of Certiorari
to the
UNITED STATES COURT OF APPEALS
for the
SEVENTH CIRCIT
No. 05-3440;
(Consolidated with 04-1950, 04-1974
and 04-2655)
And
06-2591

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QUESTIONS PRESENTED

Whether by "harmless error analysis" an appellate court can insert "large quantities of cocaine" for the "measurable quantity" of a "controlled substance" and other elements missing from the jury's verdict, as was done as to Young in *US v. Mansoori, Cox, Choice and Young*, 480 F.3d 514 (7th Cir. 2007) ("*Young II*" herein), without violating his 6th Amendment right to trial by jury.

Whether such insertion constitutes denial of an accused's demand for trial by jury and hence structural constitutional error.

Whether by "blue penciling" mandatory application of the Federal Sentencing Guidelines to avoid unconstitutionality Petitioner Young's sentence maximums can be increased without violating the *ex post facto* clause of the Constitution.

Whether re-sentencing Young to life in prison for Count 1, to 20 years each for Counts 2 and 14, and 5 years of supervised release for each of such Counts was proscribed since Young has already been incarcerated well in excess of the maximum sentence of 10 to 16 months of incarceration for Counts 1 and 2, and 33 to 41 months of incarceration for Count 14, and the 51 month maximum resulting from grouping pursuant to USSG §3D, permitted by the Federal Sentencing Guidelines based upon his jury verdict that did not

attribute to him any more than a "measurable amount" of a "controlled substance" that he distributed or conspired to distribute or that he laundered any money having knowledge of drug involvement and value.

Whether it would be inequitable to impose any supervised release, let alone the 5 years imposed that substantially exceeds the maximum permitted by the Federal Sentencing Guidelines.

Whether Young committed a federal crime.

Whether Young's indictment by one of many special grand juries sitting simultaneously and without any grand jury also sitting was a nullity.

Whether Judge Lindberg personally denying Young's 28 USC 144 affidavit and petition for his recusal was unlawful and his subsequent decisions, orders and judgments nullities therefor.

Whether 7th Circuit Court of Appeals Judges Bauer and Rovner, to whom the case was submitted pursuant to Seventh Circuit Internal Operating Procedure 6(b), should have recused themselves on the ground that they were biased against Young or that their prior conduct in the case gave that appearance, as did Judge Wood, who had also been on the panel that decided *US v. Young*, 304 F.3d. 635 (7th Cir. 2002) ("*Young I*" herein).

Whether the 7th Circuit Court of Appeal's can blithely dismiss *Young v. US*, ___ Fed. App. ___ (No. 06-251) (7th Cir. 04/06/2007) ("*Young's Forfeiture Case*" herein) for lack of subject matter

jurisdiction on the ground that forfeiture was a part of his putatively unappealed sentence when his original sentence was vacated by *Young I* as a result of his appeal.

Whether the 7th Circuit Court's endemic pattern of decision by elision of material facts and applicable legal argument constitutes an egregious violation of litigants' constitutional, statutory and judicial rights to appeal conduct of US such as to require exercise by the Supreme Court of its supervisory authority over the inferior court and the imposition of lasting remedy.

LIST OF PARTIES

The Parties to this appeal are Terry Young and the United States of America. Accordingly, service has been made on the Solicitor General as required by Supreme Court Rule 29.4.(a).

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PETITION FOR WRIT OF CERTIORARI

Terry Young respectfully petitions for a Writ of Certiorari to review the (a) Opinion of the Seventh Circuit Court of Appeals, *US v. Mansoori, Cox, Choice and Young*, 480 F.3d 514 (7th Cir. 2007), ("*Young II*" herein) which affirmed the decision of District Judge Lindberg, insofar as it relates to Young and (b) its Order in *Young v. US*, ___Fed. App.___ (No. 06-2591 (7th Cir. 04/06/207), ("*Young's Forfeiture Case*" herein).

OPINIONS BELOW

Young II was an appeal from Judge Lindberg's decisions after remand, resulting from vacation of all sentences due to errors therein discerned in *US v. Mansoori, et al.*, 304 F.3d 635 (7th Cir. 2002) ("*Young I*" herein). *Young I* is the original appeal from conviction after trial and imposition of erroneous life and other sentences imposed on Young. *Young's Forfeiture Case* was his *pro se* appeal from denial of his Federal Rule of Criminal Procedure 41 petitions challenging forfeiture of alleged substitute assets and his share of alleged assets gained from drug activities alleged in *Young I* and *Young II*.

JURISDICTION

The Supreme Court has jurisdiction pursuant to Article III of the United States Constitution and 28 USC 1254(1) as a result of the final decisions of the 7th Circuit Court of Appeals, in *Young II*, and *Young's Forfeiture Case*.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional provisions involved herein are Article I, §§ 8 and 9 and the 5th, 6th and 7th Amendments. Statutory provisions involved herein are the Federal Sentencing Guidelines, 18 USC 1956(a)(1)(B)(i), 18 USC 3143(b)(1), 18 USC 3145(c), 18 USC 3331-3334 18 USC 3553(b), 18 USC 3742(e), 21 USC 841, 21 USC 846, 21 USC 853(b)(2), 21 USC 881, 28 USC 144, 28 USC 455, 28 USC 994(p), USSG §§ 2D1.1, 2S1.1, 3D, and 5C1.1(e).

STATEMENT OF THE CASE

Solely on the basis of ersatz "harmless error analysis," *Young II* affirmed re-sentencing by Judge Lindberg, which resulted from the 7th Circuit Court of Appeals having vacated Young's original sentence and remanded for re-sentencing in *Young I* to comport with *Apprendi v. US*, 530 US 466 (2000), since the jury had not found any drug quantity or drug trafficking nexus with money laundering. Young had originally been convicted of one count of distributing an unspecified amount of a controlled substance in violation of 21 USC 841, one count of conspiring to distribute an unspecified amount of a controlled substance in violation of 21 USC 846 and one count of laundering an unspecified amount of money and without specifying that Young had knowledge that drugs of any value were involved.

Deciding himself a 28 USC 144 challenge to his re-sentencing Young, and constrained by his misinterpretation of the scope of the mandate, Judge

Lindberg failed to exercise any judicial discretion in denying all Young's challenges to federal jurisdiction and procedure set forth hereinafter, including indictment by the special grand jury and sentencing by a judge rather than a jury, despite Young's demand for trial by jury, and merely reduced one count from life to 20 years of imprisonment, reimposing the same sentence in all other respects, except that re-sentence as to forfeiture was ignored.

In *Young I* Judge Rovner overlooked Young's specific challenge of the precise error below to which she asserted there had not been objection as her excuse for improper appellate analysis, 304 F.3d @ 657-8, and in conjunction therewith, she also asserted as applicable a statutory default maximum of twenty years, ignoring that the Federal Sentencing Guidelines, which were a limitation within the statute, mandated a 16 month maximum with respect to "measurable amounts" of narcotic. Although the same regime would have applied to money laundering, she did not address the absence of value determination by the jury, nor, indeed, lack of drug involvement knowledge. That latter, indubitably, would have come within the penumbra of the presupposition she had applied to drug quantity, that, given a "properly worded" indictment a "properly instructed" jury "would have found" defendant guilty of whatever the federal government might

have asserted, 304 F.3d @657-8,[1] rendering harmless whatever error might have been committed by Judge Lindberg.

Judge Rovner's opinion in *Young I* asserted:

> For all of the foregoing reasons, we AFFIRM the defendants' convictions but VACATE their sentences and REMAND for resentencing in accordance with this opinion. [304 F.3d @ 667]

The remand was to Judge Lindberg despite the appearance of, and actual, bias demonstrable from the record, which had consequence in his having proceeded with an anonymous jury on grounds of "crimes of violence," his clearly erroneous imposition of a life sentence in obvious violation of the law, and other serious errors, 304 F.3d 635, *passim*.

Although the sentence was vacated, Judge Lindberg concluded that only Count 1 need be revised. While Young was without counsel, he filed motions to quash the indictment with prejudice, to preclude sentencing by judge, for bail pending sen-

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[1] Such presupposition is facially illegitimate as speculation substituted for fact and a violation of Young's constitutional rights to confrontation, trial and due process. *Blakely v. Washington*, 542 US 296 (2004), *Ring v. U.S.*, 536 US 584 (2002), *Harris v. U.S.*, 536 US 545 (2002), *Apprendi v. New Jersey*, 530 US 466 (2000), *In re Winship*, 397 US 358 (1970), *Duncan v. Louisiana*, 391 US 145 (1968), *Russell v. U.S.*, 369 US 706 (1962).

tencing and for Judge Lindberg's recusal pursuant to 28 USC 144.

Young's motion to quash indictment with prejudice asserted that the drug laws were unconstitutional, that possession, the essential element of the drug laws with which Young was charged, could neither be alleged *bona fide* in the indictment nor proven because the possibility of possession had been eliminated by legislative fiat as expressed in 21 USC 881(h), that the indictment was a nullity because it was issued by a special grand jury which had no right or power to issue it, special grand juries having no such right or power [18 USC 3333] or, if they do, there were more than the number permitted extant and acting simultaneously under their constitutive statute [18 USC 3332], and no grand jury sitting to which a special grand jury could be a lawful adjunct.

Young's motion to preclude sentencing by judge asserted that the jury finding of "a measurable quantity" of drugs when the indictment did not allege drug quantity constituted an unconstitutional amendment of the indictment, that the introduction of drug quantity at original sentencing by the prosecution was an attempt to effect an amendment of the indictment, which the judge permitted, likewise by unconstitutional means as only a grand jury may amend, not a petit jury, prosecutor or judge, that the jury Young selected for the trial of his case had been discharged and could no longer render sen-

tence, that the Sentencing Guidelines pursuant to which Young was going to be sentenced were unconstitutional and that, even if sentence could now be imposed, he could not be sentenced to more than 16 months of the more than six years that he had already served since that was the maximum sentence range based upon the "detectable quantity" found by the jury, applying the proper sentence guideline thereto: Level 12 under USSG § 2D1.1.

Judge Lindberg denied all Young's motions, including the motion for recusal which would have required reference to another judge according to 28 USC 144. In so doing, Judge Lindberg failed to exercise any judicial discretion, asserting:

> Most of the arguments of defendants would require the Court to go beyond the scope of the 7th Circuit's mandate, which this Court may not do in this remanded case. The only...issues for re-sentencing are...the sentence[] to be imposed on Defendant[] Young on Count 2 of the superseding indictment following the vacation of life sentence...

thereby presaging abuse of judicial discretion *per se*.

Thereupon Young timely filed his petition for mandamus in the 7th Circuit Court of Appeals to recuse Judge Lindberg and for clarification of the mandate. The panel, consisting of Judges Coffey, Easterbrook and Evans "unfiled" his petition on the

false premise that he was represented by counsel. His petition for recusal of that panel for prejudice and for reconsideration of his original petition *en banc* was "unfiled" by that same panel.

Judge Lindberg rendered his amended judgment on 8/3/05 without the explanation required by Circuit Rule 50.

In *Young II* Judge Rovner affirmed Judge Lindberg's re-sentencing, asserting that even though she had misjudged on the basis of plain error analysis there was no difference, as the error of the jury not having been asked by the prosecution and therefore not having determined any quantity of drugs and money for purposes of sentencing beyond the minimum was "harmless." Therefore, a sentence of life was affirmed as to the conspiracy count (21 USC 846) and 20 years as to the distribution count (21 USC 841), Judge Rovner ignoring that both are based on the same statutory and guideline criteria and in excess of the guidelines for the offenses of which the jury found Young guilty! *Young II* totally ignores Young's position that the maximum sentence imposable under the Federal Sentencing Guidelines is 16 months of incarceration for Counts 1 and 2, and 41 months of incarceration for Count 14 based upon a jury verdict that did not attribute to him any more than a "measurable amount" of a "controlled substance" that he distributed or conspired to distribute or that he laundered any money having knowledge of drug involvement and value.

The Order of Circuit Judges Posner, Wood and Williams in *Young's Forfeiture Case* premised dismissal on Judge Lindberg lacking subject matter jurisdiction because the forfeiture was a part of Young's sentence in his criminal case, thereby totally ignoring vacation of the total sentence in *Young I* and that Judge Lindberg had not reimposed that component of Young's sentence on remand. The government has no legal basis to hold any funds pursuant to a vacated forfeiture.

REASONS FOR GRANTING THE WRIT

"What If" Analysis is "Cataclysmic" Error. In the guise of "harmless error" analysis, *Young II* affirmed Young's sentence on the basis of an ersatz "what if" analysis, which violates the most basic right of a criminal defendant to trial by jury as guaranteed by the 6th Amendment. When a defendant demands his right to a trial by jury, how can its usurpation by Judge Lindberg, let alone Circuit Judge Rovner and her panel not denigrate the fairness, integrity and public reputation of the proceeding?

One cannot bypass this basic right by speculation that the jury would have sentenced Young on the basis of gross quantities of drugs had the jury just been asked to do so. Why have a jury trial at all if the judges can just assume what a "properly instructed" jury would do? Such a construction is the ultimate egregious denial of trial by jury, the right of appeal and due process, a grotesque circumvention of the rule of law. To permit such a perversion

would be patent evil, not just "harmful," "plain" or "structural" error. It is "cataclysmic" error that abrogates all of the individual safeguards against the encroachments of tyranny!

Denial of Jury Demand is Structural Error. More broadly, sentencing should be a jury function instead of a judge's function as the strictly construed Constitution would so mandate. In that vein, distinguishing *sentencing factors* from *elements* to preclude the jury from sentencing is disingenuous. Although the Constitutional language of both is identical, that bifurcation does not exist in civil cases. There is no constitutional reason for it to be different in the criminal case. A defendant who wants to avoid sentencing by his peers can opt for a bench trial just as the civil litigant can. A defendant who wants trial by his peers is entitled to have their decision with respect to his innocence as well as his sentence should he be found guilty. The reasons for any different scheme are sinister, to avoid jury control and nullification, to make it a rubber stamp for the Sovereign. That was supposed to have been remedied in consequence of the 1670 London jury trial of William Penn. Although the methods may be more genteel today, the same results are intended by the current regimen. Denial of demand for trial based upon positing a *virtual verdict* in place of the actual verdict is no less "structural" error than denial of the right to public trial, *Waller v.* Georgia, 467 IS 39 (1984), which of course a *virtual* jury

does, denial of the right to an unbiased petit jury, *Georgia v. McCollum*, 505 US 42 (1992), denial of the right to an unbiased grand jury, *Vasquez v. Hillery*, 474 US 254 (1986), the equivalent of the *virtual indictment* by which *Young I* was commenced, the imposition of counsel not of one's choosing, *U.S. v. Gonzalez-Lopez* (05-352) US (6/26/06), or conviction on a defective reasonable doubt standard, *Sullivan v. Louisiana*, 508 US 275 (1993).

"Blue Penciling" Mandatory Application of the Federal Sentencing Guidelines to Avoid Unconstitutionality Cannot Increase Petitioner Young's Sentence Maximums in Violation of the *Ex Post Facto* Clause of the Constitution. Justice Breyer's remedial adjunct to *Booker v. U.S.*, 535 US 220 (2006) eliminated the mandatory aspect of the federal sentencing guidelines as unconstitutional. He stated that this was essential to save the guidelines and best serve Congress' goals, while recognizing that such remedy was at best "honor in the breach" because an essential feature of Congress' sentencing scheme had been its being mandatory.

Whether his is proper interpretation need not be addressed here, as the crimes of which Young was convicted occurred well before *Booker* at a time when the Guidelines were mandatory; at a time when it was well established that the guidelines in effect at sentencing were binding on the sentencing judge unless the *ex post facto* protections of the

Constitution required otherwise, in which case the guideline in effect at the time of the offense was mandated. *U.S. v. Bader*, 956 F.2d 708, 709 (7th Cir. 1992). The 7th Circuit espoused a mix and match approach which resulted in most benefit to the defendant in sentencing from what for the defendant is the best of each guideline. *U.S. v. Anderson*, 61 F.3d 1290, 1303 (7th Cir. 1995). Sentencing changes that occurred after the charged conduct but before sentencing would not be applied if to do so would increase the sentence because that would violate the *ex post facto* clause of the Constitution. *U.S. v. Seacott*, 15 F.3d. 1380, 1386 (7th Cir. 1994). However, the 7th Circuit did not apply these principles to Young.

A judicial construction of a criminal statute is subject to the same *ex post facto* constraints as a legislative revision. *Bouie v. City of Columbia*, 378 US 347 (1964), *Marks v. U.S.*, 430 US 188 (1977), *Rogers v. Tennessee*, 532 US 451 (2001) hold that if a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, the judicial construction must not be given retroactive effect.

There can be no question that the change in the sentencing scheme effected by Justice Breyer's remedial solution to an otherwise unconstitutional sentencing guideline, i.e. to make them advisory rather than mandatory as set forth in 18 USC

3553(b), was unexpected and indefensible by reference to the law theretofore. That's why his remedy required excision of the cited section to eliminate the mandate to judges that they must follow the guidelines, 18 USC 3742(e) which provided for *de novo* appellate review, and the substitution therefor of "reasonableness" as the standard for such review.

As clear further demonstration that Justice Breyer's removal of the sentencing guideline mandate was unexpected and indefensible, consider that none of the parties and none of the amici briefed or sought the remedy that Justice Breyer foisted on them. To them, and to all, it was inconceivable because it was directly and clearly contrary to the will of Congress. That is why Justice Breyer had to eliminate portions of the statute as unconstitutional. Even Justice Breyer admitted that his redefinition of the federal sentencing scheme was "radical." He apologized by saying his remedy would depart less radically than a total declaration of unconstitutionality. That is highly questionable given how central to the Congressional scheme was mandatory application. What precedent is there for what Justice Breyer did? Typically, a statute will make provision for severance, if that is the desire of the legislature, so that the remainder will still stand. Without such a provision, the remainder will not stand. A severance provision is not to be found in the criminal code. The courts do not "blue pencil" legislation because doing so is legislating in clear violation

of the separation of powers embedded in the Constitution and our federal culture of checks and balances. Although Justice Breyer had the last word, that word was unexpected and indefensible based upon prior law. Accordingly, Young is protected from what Justice Breyer did, as it has only prospective effect. In consequence, Young's sentence is limited to the maximums indicated above.

Booker changes nothing for Young because *Apprendi*, and *Blakely*, and, yes, *Jones v. U.S.*, 526 US 227 (1999), upon which he relied and cited as basis for his objections, are confirmed by *Booker*. Furthermore, the interpretation that *Booker* has been given by the inferior courts cannot be applied to Young because that interpretation would violate the *ex post facto* clause of the United States Constitution.

Young is entitled to that aspect of *Booker* which confirms the application of the *Apprendi* and *Blakely* principle to the Federal Sentencing Guidelines, that principle being that the sentencing judge is confined to the facts determined beyond a reasonable doubt by the jury. That aspect of *Booker* which releases the sentencing judge from the mandate of the Guideline caps cannot apply to Young because the Constitution prohibits it.

Grouping of the distribution, conspiracy and money laundering counts is mandated by the Sentencing Guidelines as they are applicable to Young because of the rules regarding which guideline is

applicable and the *ex post facto* clause of the U.S. Constitution. The maximum sentence to which the proper analysis could lead is 51 months!

Young's Sentence Violates the Constitution as it is Not within the Limitations of the Federal Sentencing Guidelines as Determined by the Actual Jury Verdict. Re-sentencing Young to life in prison for Count 1, to 20 years each for Counts 2 and 14, and 5 years of supervised release for each of such Counts has been proscribed because at the time of re-sentencing Young had already been incarcerated well in excess of the maximum sentence permitted by the Federal Sentencing Guidelines based upon his jury verdict that did not attribute to him any more than a "measurable amount" of a "controlled substance" that he distributed or conspired to distribute, or that he laundered any money having knowledge of drug involvement and value. Base Offense Level 12 is the level for the least amounts of heroin, cocaine and cocaine base, under the Drug Quantity Table set forth at USSG §2D1.1. Since the jury did not find any quantity of these drugs, 304 F.3d @ 657-8, Level 12 is the mandated offense level for sentencing Young. The Sentencing Table set forth as Part A, Chapter Five of the Federal Sentencing Guidelines mandates a sentence range of 10 to 16 months of incarceration for Level 12, Criminal History Category I (Young's Category since he had no Criminal History Points because he had no prior criminal history). This range applies

equally to 21 USC 841(a) drug distribution and to 21 USC 846 conspiracy offenses, the latter section specifically so stating. As Young was convicted of money laundering in violation of 18 USC 1956(a)(1)(B)(i), without jury finding that Young knew or believed that the funds were proceeds of an unlawful activity involving manufacture, importation, or distribution of controlled substances and without jury designation of value, the maximum Base Offense Level is 20 as set forth at USSG §2S1.1. Therefor, the Sentencing Table set forth as Part A, Chapter Five of the Federal Sentencing Guidelines mandates a sentence range of 33 to 41 months of incarceration where Criminal History Category I obtains for Young who had no prior criminal history.

Also, Counts 1, 2 and 14 are duplicitous. Also, they constitute overcharging as repetitive counting for the same conduct. For that, and because the Sentencing Guidelines require quantity and value based Counts to be grouped so that they can be aggregated, Counts 1, 2 and 14 should have been treated as one for sentencing, resulting in one just sentence.

USSG §3D provides for grouping of multiple counts for sentencing for offenses under certain guidelines, including specifically USSG §2D1.1 (drug distribution) and §2S1.1 (drug conspiracy) [§3D1.3]. If they are treated as one group, the maximum total sentence could be 41 months. If

they are treated as separate groups, the highest would be money laundering (Level 20). Since 2D1.1 is eight levels lower it is counted under 3D1.4 as ½ unit and one level is added to Level 20, making the allowable punishment range 41 to 51 months. Consecutive sentencing is not permitted in Young's circumstances under the applicable guidelines.

That these limitations based on the facts established (or not) by the jury are the maximums applicable to Young has been confirmed by *Booker v. U.S.*, 535 US 220 (2006), *Blakely v. Washington*, 542 US 296 (2004), *Apprendi v. New Jersey*, 530 US 466 (2000), and most recently, *Cunningham v. California* (05-6551), US (1/22/07). That they are in the Sentencing Guidelines and not the Statutes has no effect on this conclusion. The Federal Sentencing Guidelines have the same force of Congressional edict as any other statutory enactment, having been presented to Congress and not disapproved in accordance with Congress' statutory procedure therefor under 28 USC 994(p). Also, the Supreme Court has consistently held that the Federal Sentencing Guidelines have the force and effect of laws, *Booker*, *Mistretta v. U.S.*, 488 US 361, 391 (1989), *U.S. v. Stinson*, 508 US 36, 42 (1993), because the Guidelines were mandatory and therefore binding on judges. See also *U.S. v. Dunnigan*, 507 US 87

(1989), *Witte v. U.S.*, 515 US 389 (1997) and *Edwards v. U.S.*, 523 US 511 (1998).

Young Did Not Commit A Federal Crime. The reasons are statutory, constitutional, and judicial. Statutorily, Congress precluded the offenses of which Young was convicted by legislative fiat. Possession is an essential element of 21 USC 841. 21 USC 846 is premised on agreement to violate a Title 21 offense. If there is no legal possibility of a violation of 21 USC 841, a violation of 21 USC 846 cannot exist either. If there is no predicate offense, an essential element of 18 USC 1956 is missing. Without possession or the possibility of possession, this chain of offenses in discatenated. Young was legally incapable of possessing a controlled substance, a required element of the crime of which he was charged in one Count of his indictment, violation of 21 USC 841. This is because his ability to possess had been eliminated by 21 USC 881. Absent possession or its possibility, there can be no violation of 21 USC 846 or 18 USC 1956. 21 USC 881(a) provides that there shall be no property right in any controlled substance which has been manufactured, distributed, dispensed, or acquired in violation of federal drug law. 21 USC 881(h) provides that all right, title and interest in property described in 21 USC 881(a) shall vest in US upon the commission of an act giving rise to forfeiture under 21 USC 881. Possession is such an interest. Furthermore, 21 USC 853(b)(2) specifically includes

within its definition of property subject to forfeiture "tangible and intangible personal property, including rights, privileges, interests, claims and securities." In other words, it includes everything.

Accordingly, any predecessor act to Young's alleged possession resulted in his inability to have any property right cognizable under law, e.g. possession. The indictment itself alleges acts by others violative of Title 21 which are prior to Young's alleged possession. The indictment is a judicial admission by the United States. Judicial notice must also be taken that the drugs involved in this case are obtained initially solely by importation from foreign countries, a violation of Title 21. Hence, numerous prior acts of others in violation of Title 21 occurred that precluded Young having possession as a matter of law. Absent possession, which has been precluded by federal legislative fiat, Young could not have possessed with intent to distribute as required by the distribution Count, nor agreed to do something violating Title 21 as required by the conspiracy Count, nor committed a predicate offense as required by the money laundering Count. Accordingly, the indictment, the prosecution and the conviction must be quashed as a nullity.

Where the evidence taken most favorably to the prosecution is insufficient to prosecute or convict, the defendant should not be dragged through the demeaning and debilitating process of pre-trial incarceration and trial, *U.S. v. CIO*, 335 US 106

(1948), only to have the case thrown out because, taken most favorably to the prosecution, there is insufficient evidence to sustain a conviction by a rational jury. *Jackson v. Virginia*, 443 US 307 (1979). Here, US got the verdicts it sought, one without "drug quantity," another without a finding that Young "knew or believed that the funds were proceeds of an unlawful activity involving manufacture, importation, or distribution of controlled substances and without jury designation of value," so that US could get the outrageous sentence it wanted without having to present to the jury their despicable schnitz,[2] and suffer the crucible of convincing a jury beyond a reasonable doubt and possible jury nullification. However, US' avoidance scheme came abruptly to an end with *Jones*, *Apprendi*, and *Blakely*. *Young I* occurred in that crevice between *McMillan v. Pennsylvania*, 477 US 79 (1986), and *Booker* wherein the constitutional right to jury determination of "sentencing factors" was acknowledged and recognized as compelling mandated sentence guide limitations. That meant for Young that the jury had not found the facts necessary to sentence him beyond the bare minimum as determined by the Federal Sentencing Guidelines, which were still mandatory at the time of his sentencing so that

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[2]Worse than a snitch who tells on another, a schnitz (Bronson, Buchanan, Carter, Hunt, Teague) is one who made up what is told, frequently as the result of prosecutorial coercion or bribe!

US was stuck with what the jury had determined rather than whatever the judge might do to Young based on preponderance, or, in this case, speculation. That meant US got caught in the switches in cases like Young's. Judge Rovner completely ignored this reality, however, by asserting that a *virtual jury* could substitute for the actual jury in Young's case and render a *virtual sentence* based on her "what if" analysis, thus wiping out the actual indictment, the acutal verdict and the constitutional rights that Young obtained when he demanded a jury trial. Were "trial by jury" interpreted in the criminal context in the same way as in the civil context, pp. 9-10 *supra*, the sentencing mess in which the courts are now mired would be avoided completely.

Constitutionally, US was not intended by the Founding Fathers to prosecute the kinds of offenses of which Young was convicted. US has limited powers. Its limited legislative power was vested in Congress. Article I, § 8 confined Congress' powers to legislate crimes to: counterfeiting US securities, currency and coins; piracies and felonies committed on the high seas; offenses against the Law of Nations; and crimes committed by members of the militia and by persons on federal enclaves. US has relied on the Commerce and Necessary and Proper Clauses of the Constitution as the basis for circumventing these limitations. Innumerable unconstitu-

tional statutes are based thereon, including 21 USC 841, 21 USC 846 and 18 USC 1956.

The Commerce and Necessary and Proper Clauses are an unconstitutional basis for enacting criminal laws. The former was meant to protect commerce from the encroachments of foreign nations, the States and Indian Tribes only. The establishment of the federal government as one limited to authority delegated by the Constitution means that there is no federal common law of crimes. Tunis Wortman's *Treatise* (NY,1800), pp. 229-230, 253. Were it otherwise, the Drafters of the Constitution would not have had expressly "to provide for the punishment of counterfeiting the securities and current coin of the United States" [Article I, Section 8, Clause 6], there being also the power "to coin money, regulate the value thereof..." [Article I, Section 8, Clause 5]. They would not have had "to define and punish piracies and felonies committed on the High Seas and offenses against the Law of Nations." [Article I, Section 8, Clause 10.] The Commerce Clause would have taken care of that. This simplest comparison of such powers as to which Congress is also given specific criminalizing power guts any credible argument that the Commerce Clause itself confers criminalizing powers.

The Necessary and Proper Clause of the Constitution was not meant to enlarge the powers of the federal government, but merely to make possible execution of the limited powers ceded to the federal

government as set forth specifically in the Constitution. *Ibidem*, pp. 231, 238-9.

The Supreme Court should not perpetuate misuse of the Commerce and Necessary and Proper Clause as described herein. Such misuse is an execration of the Constitution.

Judicially, Young's indictment by one of many special grand juries sitting simultaneously instead of by a grand jury was a nullity. Defendant Young was indicted by special grand jury in 1997. A special grand jury is formed pursuant to, governed and restricted by 18 USC 3331-4. 18 USC 3333(a)(1) provides that the duty of the special grand jury shall be to render reports regarding criminal activity in the district. 18 USC 3334 makes the grand jury provisions of chapter 215 of Title 18 and the federal rules of criminal procedure applicable to special grand juries to the extent not inconsistent with Sections 3331-4. Thus, general secrecy and appearance provisions are applicable to special grand juries because no provision is made in Sections 3331-4 therefor and nothing in Sections 3331-4 is inconsistent therewith. Not so the indictment provision. There is no mention of it in Sections 3331-4, but it is inconsistent with the stated purpose and duties of the special grand jury as stated in 18 USC 3331-3 to render reports. Therefore the special grand jury indictment of Young is a nullity. 18 USC 3331(a) provides various criteria for the formation of a special grand jury, among them to relieve the grand

jury of some of its obligation to investigate when the volume of business appropriate for a special grand jury, i.e. the investigative function, exceeds the capacity of the grand jury to discharge its obligations, i.e. the investigative and indictment functions. Although legislative authorization is confined to one special grand jury, not any number, numerous special grand juries were sitting in the Northern District of Illinois at the time that the special grand jury sat with respect to Young's indictment and issued it. In addition, on information and belief, at such time there was no grand jury sitting in the Northern District of Illinois, Eastern Division, other than special grand juries. Accordingly, the statutory basis for the special grand jury that indicted Young did not exist and the empanelment of such special grand jury and its conduct, including its investigation and issuance of the indictment against Young was a nullity. 18 USC 3331(a) authorizes "a" special grand jury if special criteria are met. Had Congress meant more than "one," it knew how to write "one or more" or "special grand juries" rather than "a special grand jury," which is what it did write.

Judicial Bias. Judge Lindberg personally denying Young's 28 USC 144 affidavit and petition for his recusal was unlawful and his subsequent decisions, orders and judgments nullities therefor. 28 USC 144 provides that another judge than the subject of the affidavit filed pursuant thereto shall be substituted immediately for such subject

judge to hear the matter. This section is unlike 28 USC 455 under which the subject judge makes his own determination whether he is prejudiced. Yet Judge Lindberg, the subject judge, took unto himself this determination on the merits in violation of 28 USC 144, thereupon denied Young's motion for bail, which is based upon the apodictic statements of the *pro se* motions to quash the indictment to preclude sentencing by judge, all of which he also denied, and sentenced Young based upon his misconstruction of the mandate from the 7th Circuit Court of Appeals, which, although itself not the least bit confusing, is, admittedly, part of an opinion by Judge Rovner which is confusing, because it is self-conflicting and premised on an erroneous reading of the sentencing transcript, penalty statute [21 USC 841(b) and guidelines [USSG § 2D1.1]. The rulings that he made thereupon were therefore a nullity.

Recusal pursuant to 28 USC 144 is mandatory once a party has submitted a timely and sufficient affidavit and counsel submits a timely statement that the affidavit is made in good faith. *U.S. v. Sykes*, 7 F.3d 1331 (7th Cir. 1993). Instead, Judge Lindberg decided Young's motion for recusal on the basis that he was not biased, which is contrary to 28 USC 144 and to the admonition of *U.S. v. Horton*, 98 F.3d 313 (7th Cir. 1996) that the judge must assume the truth of factual assertions even if he knows them to be false. Judge Lindberg did not

address the two items which a judge the subject of the recusal effort has been permitted, i.e. the timeliness and sufficiency of the affidavit. Nor did he question the counsel's certificate, which, necessarily Young signed as his own counsel. Therefore the matter is simply one of Judge Lindberg having violated 28 USC 144 by proceeding to deny the motion.

Indeed, Young's affidavit was sufficient and timely. The affidavit was filed before any substantive rulings were made by Judge Lindberg in the proceeding for re-sentencing. To be sufficient, an affidavit must state facts and reasons for the affiant's belief that bias or prejudice exist and give fair support to the charge of a bent mind that may prevent or impede impartiality of judgment. Such assertions may be made on information and belief. *Berger v. U.S.*, 255 US 22 (1921), *Turner v. Kerner*, 186 F.2d 79 (7th Cir. 1950). Young's affidavit did this. Much of the affidavit describes so-called "extra-judicial" influences and expressions of bias, i.e., his daughter's book, his affiliation and association with his daughter and son-in-law, who are both steeped in the investigation and research of gang activities and events which Judge Lindberg ascribed to Young. However, Young also referred to Judge Lindberg sentencing him to life in prison which so far exceeded the applicable guidelines as to reek of bias; his false positing that Young was

guilty of a crime of violence and therefore would not be considered for a downward departure based on diminished capacity, another of Judge Lindberg's propositions so obviously erroneous as a matter of law as to also reek of bias. Likewise, Judge Lindberg's imposition of restitution unlawfully! Normally one would say that these would be left for appeal. Indeed, here the Court of Appeals reversed and remanded because of them in themselves. In *Liteky v. U.S.*, 510 US 540(1994), the majority (Rehnquist, O'Connor, Scalia, Thomas and Ginsburg) asserts a higher standard for bias arising during the course of judicial proceedings than bias from extrajudicial source. Justice Scalia, its author, also asserts that the so-called "extrajudicial source" doctrine is not much of a doctrine and appears to abandon it, relegating the concept to a mere "factor" in the total analysis. *Id.* @ 489-90. The concurring minority (Blackman, Stevens, Souter and Kennedy) correctly states that the higher standard is not a fair interpretation of the statute and not substantively different from the *per se* rule which the majority rejects. *Id.* @ 496. Technically, both majority and minority are addressing 28 USC 455(a). The majority, Id. @ 489-90, and the minority, Id. @ 494-5, agree that an allegation concerning some extra-judicial matter is not a necessary condition for disqualification under any of the recusal statutes. Indeed, 28 USC 144 is quite mechanical. It takes no account of the source

of the bias. the affidavit describes a pervasive and continuing bias, especially when supplemented by the confirmation made by Defense Attorney Clavelli, who was appointed by Judge Lindberg, and memorialized in Young's motion to dismiss appointed counsel. Clavelli confirmed that Judge Lindberg was so prejudiced against Young that he would probably want to reimpose a life sentence even though that would be contrary to the opinion of the 7th Circuit Court of Appeals, that Judge Lindberg had it in for Young. Judge Lindberg would not re-sentence with respect to Count 1; he would let Young's life sentence stand, no matter what Judge Lindberg did with respect to Counts 2 and 14. Had the 7th Circuit Court of Appeals intended that consequence, it would have decided that the error related solely to Count 2 was harmless, as Young has but one life to give. Remand would have been for the limited purpose of the downward departure and restitution and the mandate so limited specifically. However, at the outset and at the end of Judge Rovner's opinion, the mandate is expressed generally and without limitation. The sentences are vacated and the case is remanded for re-sentencing. The scope of the mandate is determined by the order of remand. *U.S. v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996). Remand for resentencing must permit the parties to raise all issues relevant thereto and the judge to whom

the matter is remanded must be made to understand that. Otherwise, perpetual Sisyphusian appeals will likely rut Justice' steep into oblivion. As set forth in Young's bail motion, the criteria for release are set forth in 18 USC 3143(b)(1). He met the one overriding criterion thereof, that he is "a person for whom the applicable guidelines promulgated pursuant to 28 USC 994 does (sic) not recommend a term of imprisonment." The guidelines do not recommend a term of imprisonment for a person who has already served substantially in excess of any sentence that could be imposed under the guidelines. Young had served over nine years in prison.

As sentence beyond the limits is a matter of law, no further factual findings at the trial level are necessary. In addition to the appellate powers conferred by 18 USC 3145(c), 18 USC 3141(b) confers on a "judicial officer of a Federal appellate court" the power to release Young pending and appeal also.

Certain judges of the 7th Circuit Court of Appeals should have recused themselves on the ground that they are biased or that their prior conduct in the case gave that appearance. Circuit Judges Coffey, Easterbrook and Evans were specifically cited in a petition for *en banc* reconsideration, which Young attempted to file in the 7th Circuit Court of Appeals following their "unfiling" his initial Mandamus Petition there. These judges were also included with

Judge Lindberg in Young's petition for writ of mandamus to the Supreme Court to compel their recusal for bias and the appearance of bias. In all Young's filings, Judge Rovner had been severely criticized for her erroneous opinion, which has delayed justice for Young. Young suggested these judges remove themselves from any involvement in his case on the basis of bias or, at least, the appearance of bias as their consciences and their duties pursuant to 18 USC 455 would dictate. They did not; thus compounding the injustice that is this case.

The Forfeiture of Young's Assets is a Nullity because there is no judgment extant to support it.. The 7th Circuit Court of Appeals would like to have it both ways, but it cannot without violating basic law and common sense. The panel (Judges Posner, Wood and Williams) affirmed the forfeiture on the basis that the district court (Judge Lindberg) lacked subject matter jurisdiction over Young's Rule 41 motions because forfeiture is a part of his criminal sentence. In so doing, that panel ignored *Young I*, which had vacated Young's entire criminal sentence. In so doing, that panel also ignored that Judge Lindberg had not re-sentenced Young to forfeiture. In so doing, that panel also ignored that *Young II* did not address forfeiture either.

The 7th Circuit Court of Appeals Needs Supreme Court Supervision. The 7th Circuit in *Young I*, *Young II*, and *Young's Forfeiture Case*, and repeatedly in other criminal appeals ignores the

facts of record, makes up what suits its purposes, and proceeds on its preconceived prejudices to wrong decisions. The *virtual jury verdict* posited by Judges Rovner and the *virtual forfeiture* posited by Judge Posner are but recent examples in a long line of *virtual appeals*. Numerous other examples are available, but already the Supreme Court has many examples in its files that offer convincing evidence of the need for Supreme Court supervisory intervention of the 7th Circuit Court of Appeals.

CONCLUSION

As *Young I*, *Young II* and *Young's Forfeiture Case* proceeded from a *virtual indictment*, as a *virtual jury verdict* was substituted for the actual jury verdict in *Young II* based on the 7th Circuit Court of Appeals ersatz "what if" analysis, as an unconstitutional sentence, including life imprisonment, was imposed on Young, as Young committed no federal crime, as Young was indicted by a special grand jury, which had no such power, and therefore the indictment was a nullity, the Supreme Court must grant the writ so that these egregious constitutional violations will be remedied and Young be freed.

Respectfully Submitted,

Michael B. Cohen,
Attorney for Terry Young

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Supreme Court, U.S.
FILED
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No.

In the
Supreme Court of the United States

United States of America
Respondent-Appellee,
v.
TERRY YOUNG,
Petitioner-Appellant.

On Petition for Writ of Certiorari
to the
UNITED STATES COURT OF APPEALS
for the
SEVENTH CIRCUIT
No. 05-3440;
(Consolidated with 04-1950, 04-1974
and 04-2655)
And
06-2591

APPENDIX

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Young I:

United States v. Mansoori, 304 F.3d 635 (7th Cir. 08/29/2002)
U.S. Court of Appeals, Seventh Circuit
Nos. 99-1492, 99-3533, 99-3569, 99-3570, 99-3623
August 29, 2002
As amended October 16, 2002. Petition for rehearing denied.
UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,
v.
BAHMAN MANSOORI, MARK COX, MOHAMMAD MANSOORI, KENNETH CHOICE, AND TERRY YOUNG, DEFENDANTS-APPELLANTS.
Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 97 CR 63--George W. Lindberg, Judge.
Before Bauer, Rovner, and Diane P. Wood, Circuit Judges.
The opinion of the court was delivered by: Rovner, Circuit Judge
ARGUED NOVEMBER 8, 2000
Appellants Kenneth Choice, Mark Cox, Bahman Mansoori, Mohammad Mansoori, and Terry Young were collectively convicted of conspiracy to possess with intent to distribute cocaine, cocaine base and heroin. Cox and Young were also convicted of possession of cocaine with the intent to distribute;

Mohammad Mansoori was convicted of engaging in monetary transactions involving funds derived from criminal activity; and Young was convicted of money laundering. We affirm the appellants' convictions but, based on certain errors at sentencing, vacate their sentences and remand for re-sentencing in conformity with this opinion.

I.

On October 31, 1996, a drug transaction many months in the planning finally came to pass. Several members of the Chicago street gang, Traveling Vice Lords ("TVL"), who were engaged in narcotics trafficking had organized a drug deal that, unbeknownst to them, would be captured on recorded telephone conversations obtained through court authorized wiretaps. On that date, TVL leader Terry Young had arranged for TVL member Timothy White to purchase a kilogram of cocaine for resale from Mark Clemons.

Young's right-hand man, Kenneth Choice, was assigned to transfer the cocaine from White to another TVL member, Terry Bronson, who would keep it until Mark Cox came to pick it up for resale on the street. Once Bronson was in possession of the cocaine, the police began to follow his car. A chase ensued that finally ended with Bronson crashing his car into a garage and fleeing the scene of the accident without the cocaine, which the police officers seized. Arrests of the individuals who had participated in the narcotics trafficking ensued.

The evidence at trial revealed that each of the appellants participated in a conspiracy to distribute narcotics in a different capacity. Mohammad Mansoori was not a member of TVL, but along with his brother, Bahman, distributed drugs and guns to Young. Young, Cox, and Choice were all members of TVL. They used the gang to plan highly organized drug transactions that culminated in street-level sales of cocaine and heroin at locations controlled by the gang. Young, a high-ranking TVL member, was in charge of the drug sales. Young obtained drugs and guns from Mohammad and Bahman Mansoori and then distributed both (the drugs for resale, and the firearms for protection) among various members of the gang. He assigned other gang members to certain locations where they carried out their sales. Choice worked directly for Young within the gang, picking up and delivering drugs for various TVL members. Cox also worked directly under Young, managing a large area of drug distribution locations.

Both Mohammad Mansoori and Young purchased property with earnings from the drug enterprise. Mansoori made several large cash payments to contractors for a house he was having built in Highland Park. He had confessed to an accountant and an IRS agent that he did not receive any money from his legitimate enterprises. The police had also stopped Mansoori and seized about $11,000 in cash made from a suspected drug transaction. Young had

purchased a house through a nominee purchaser, Lovell Nabors. Although Nabors signed a lease with purchase option for the house, he used Young's money to make the purchase and understood that the house was actually Young's. An IRS agent testified that he did not think that Young could have purchased the property with his legitimate sources of income.

The jury convicted appellants of all charges, and this appeal arises from the convictions and the lengthy sentences that the district court imposed pursuant to those convictions.

II.

A. Wiretap Order

On four occasions in late 1996 and early 1997, then-Chief Judge Marvin Aspen of the Northern District of Illinois entered orders authorizing the government to monitor various telephone numbers which, the government believed, the defendants were using to conduct their narcotics business. The orders indicated that the conversations intercepted from these telephone numbers were expected to reveal:

(1) the identities of individuals possessing with intent to distribute and distributing controlled substances;

(2) the locations where the controlled substances were distributed and stored;

(3) the methods by which the controlled substances were distributed and drug proceeds are distributed;

(4) the dates, times and manner of the transportation, receipt, storage, distribution and delivery of the controlled substances and proceeds;

(5) the nature and scope of the conspiracy; and

(6) the identities and roles of unidentified conspirators. Appellants' Joint Appendix ("App.") 228-29, 237-38, 245-46, 254. Each order also compelled the government to minimize (i.e., limit) the interception of conversations that did not relate to the government's investigation.

Monitoring of wire conversations must terminate immediately when it is determined that the conversation is unrelated to communications subject to interception under Chapter 119, Title 18, United States Code.

Interception must be suspended immediately when it is determined through voice identification, physical surveillance, or otherwise, that none of the named interceptees or any of their confederates, when identified, are participants in the conversation unless it is determined during the portion of the conversation already overheard that the conversation is criminal in nature . . . App. 232, 241, 248-49, 257; see 18 U.S.C. § 2518(5).

Conversely, however, the orders also permitted the individual monitoring to spot check any minimized conversation to ensure that the participants

had not turned their discussion to illicit matters within the scope of the investigation. Nos. 99-1492, 99-3533, 99-3569, 99-3570, 99-3623 5 ("If the conversation is minimized, the monitoring individual shall spot check to ensure that the conversation has not turned to criminal matters."). App. 232, 241, 249, 257-58.

Pursuant to these orders, the government intercepted more than 3,500 telephone conversations. In order to determine whether a given conversation fell within the scope of the intercept order or instead concerned matters unrelated to the investigation, the government would initially intercept the conversation for a period of two minutes. If the monitoring individual determined that the conversation was beyond the scope of authorized surveillance, the interception would cease at the end of the two-minute period in compliance with the minimization requirement of the wiretap orders. *fn1 However, if that conversation lasted for more than another minute or so, the monitoring individual would reintercept the conversation and perform a follow-up spot check to confirm that the conversation had not progressed into the scope of authorized surveillance.

In practice, this meant that all telephone calls under two minutes in length were intercepted (whether relevant to the investigation or not) and that one or more two-minute segments of longer conversations were also intercepted, even when those conversations were irrelevant to the investiga-

tion. A summary prepared by the government indicates that of all the calls intercepted: 565 conversations were identified as criminal in nature and so were not minimized; 1,791 conversations were not pertinent to the investigation but were not minimized because they lasted no more than two minutes; and another 366 were not pertinent and exceeded two minutes in length, and of these nearly all (362) were minimized. R. 267 at 21. *fn2

In advance of trial, the defendants moved to suppress all of the intercepted conversations, contending that the government had not complied with the minimization requirement and, as a result, had unnecessarily and inappropriately eavesdropped on a number of conversations that were beyond the scope of its investigation. Judge Lindberg denied the motion. Although the judge agreed that the government had intercepted a number of conversations, or portions of conversations, that were beyond the scope of the wiretap orders, he did not believe that the government's agents had listened to more of the conversations than necessary in order to determine that they were irrelevant:

[I]t is understandable that a fair amount of material not pertinent to the investigation wound up being intercepted in this investigation. Many of the conversations were under two minutes in length, and so did not require minimization. The individuals conversing often did so in an ambiguous, guarded, and possibly coded manner so that more of

the conversations had to be intercepted to later sort out what in fact they were talking about. The Government had evidence that defendant Terry Young was the head of a major drug ring justifying more extensive interception. And the authorizing judge was supervising the electronic surveillance in an ongoing manner, receiving reports on it at ten day intervals. R. 335 at 2.

At trial, the government introduced approximately 300 of the tape recordings into evidence. Because these recordings captured the defendants discussing narcotics transactions, they proved to be some of the most direct and damning evidence in the prosecution's arsenal.

On appeal, the defendants initially argue that the wiretap orders, by virtue of the provision allowing periodic spot checks of any minimized conversation "to ensure that the conversation has not turned to criminal matters," violated their statutory and constitutional rights. Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq., includes a mandate that "[e]very [intercept] order and extension thereof shall contain a provision that the authorization to intercept . . shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter . . ." 18 U.S.C. § 2518(5). Although the intercept orders in this case included a minimization requirement, the defendants believe that this provision of the orders was

rendered virtually meaningless as a result of the orders' additional provision that "the monitoring individual shall spot check to ensure that the conversation has not turned to criminal matters." App. 232, 241, 249, 257-58 (emphasis added). They find the spot-check provision problematic in two respects: (1) the provision imposed no limits on the frequency or duration of spot checks; and (2) because the provision referred broadly to "criminal matters" rather than to the specific criminal activities for which Judge Aspen had authorized interception, the orders permitted the government to check each and every minimized conversation for any discussion of criminal activity, even criminal activity that was unrelated to the government's investigation.

Because the defendants did not make this particular challenge below, our review is for plain error alone, see United States v. Williams, 272 F.3d 845, 854-55 (7th Cir. 2001), cert. denied, 122 S. Ct. 1339 (2002), and we find no such error in the terms of the order. Express limits on the frequency and duration of spot checks may well be impractical, as neither the government nor the authorizing court can know in advance how easy it will be for the monitoring agent to discern whether any given intercepted conversation concerns a subject within the scope of the investigation or not. A conversation may be short and to the point or long and meandering; and a conversation may begin on a non-pertinent topic but switch to a pertinent subject in short order. Use of

code language, which as the district judge recognized is common among narcotics traffickers, can make quick assessments of the pertinence of a conversation difficult. So we cannot say that Judge Aspen erred when he refrained from placing a one-size-fits-all limitation on either the frequency or duration of follow-up spot checks or that Judge Lindberg plainly erred when he declined to suppress the results of the surveillance for want of such a limitation.

Nor do we think that the provision's generalized reference to "criminal matters" plainly rendered the spot-check provision overbroad.

When read in context with the other terms of the wiretap orders, that language did not give the government license to monitor all minimized conversations for any mention of criminal activity, whether related to the investigation or not. The orders specifically identified the type of evidence that the authorized intercepts were intended to capture. App. 228-29, 237-38, 245-46, 254. Furthermore, the orders required the government to stop monitoring a conversation "immediately" if the conversation turned out not to constitute "communications subject to interception under [Title III.]" App. 232, 241, 248, 257. The orders also acknowledged that Title III allowed for the interception and disclosure only of "those communications relevant to the pending investigation . . ." App. 232, 241, 248, 257. Indeed, the government's instructions to its monitoring

agents noted that "[w]e do not have authorization to overhear evidence concerning the commission or planning of crimes other than those [specified previously in the instructions] as illegal activities." R. 267 Ex. A at 7; see also id. at 3-4 (specifying illegal activities as to which interception permitted). Notwithstanding the language of the spot-check provision, then, the overall terms of the orders made reasonably clear that the government was permitted to check intercepted conversations solely for discussions pertinent to the government's investigation, the nature and scope of which the face of the orders made clear. Any impermissible overbreadth in the spot-check provisions of the orders was not plain.

The defendants' second challenge focuses on the adequacy of the government's efforts to comply with the minimization requirement. What the minimization requirement means, essentially, is that once the monitoring agent has had a reasonable opportunity to assess the nature of an intercepted communication, he or she must stop monitoring that communication if it does not appear relevant to the government's investigation. In this case, the government's instructions to the monitoring agents indicated that they could listen to all calls involving one of the individuals named in the instructions "for a reasonable time, usually not in excess of two minutes, to determine whether the conversation concerns criminal activities." Id. at 5. *fn3 In practice,

the agents monitored the entirety of all calls under two minutes in length (some 1,791 calls, 103 of which were in Farsi). Moreover, calls in excess of two minutes that were deemed non-pertinent after the initial two-minute assessment were, per the instructions, periodically reassessed (again for up to two minutes at a time) at intervals of at least one minute. Id. at 5-6. So, theoretically, an agent could listen to the first two minutes of a conversation, decide it was non-pertinent, turn off the listening and recording devices for a minute, then turn them back on and listen to the conversation for another two minutes, and so on--and in this way monitor as much as two-thirds of a non-pertinent conversation. *fn4 The defendants argue that because the government's agents listened to each call for a period of two minutes to determine initially whether or not the conversation fell within the scope of the wiretap orders, and because they performed periodic, two-minute spot-checks on minimized calls, there was no real minimization in practice.

A court assessing the sufficiency of the government's efforts in this regard must ultimately decide whether the steps that agents have taken to minimize the interception of communications unrelated to the investigation were objectively reasonable given the circumstances confronting the agents. See Scott v. United States, 436 U.S. 128, 137, 98 S. Ct. 1717, 1723 (1978). Although the adequacy of the government's minimization efforts necessarily de-

pends on the facts of each case, relevant considerations include the kind and scope of criminal enterprise that the government was investigating, the thoroughness of the government's efforts to ensure that non-pertinent calls will be minimized, the extent to which the government could have foreseen that certain types of conversations would be innocuous and thus subject to minimization, use of code, and the extent to which the authorizing judge oversaw the interception efforts. United States v. Quintana, 508 F.2d 867, 874-75 (7th Cir. 1975); see also United States v. Charles, 213 F.3d 10, 22 (1st Cir.), cert. denied, 531 U.S. 915, 121 S. Ct. 272 (2000); United States v. Bankston, 182 F.3d 296, 307 (5th Cir. 1999), judgment rev'd on other grounds by Cleveland v. United States, 531 U.S. 12, 121 S. Ct. 365 (2000); United States v. Williams, 109 F.3d 502, 507 (8th Cir.), cert. denied, 522 U.S. 917, 118 S. Ct. 303 (1997). "[W]here an nvestigation involves a drug ring of unknown proportion, as in this case, 'the need to allow latitude to eavesdroppers is close to its zenith.' " Charles, 213 F.3d at 22, quoting United States v. Hoffman, 832 F.2d 1299, 1308 (1st Cir. 1987). We review the district court's minimization assessment for clear error. United States v. Moody, 977 F.2d 1425, 1433 (11th Cir. 1992), cert. denied, 507 U.S. 1052, 113 S. Ct. 1948 (1993); Bankston, 182 F.3d at 306.

We are not inclined to view the government's overall approach to minimization in this case as in-

sufficient. The government was investigating what the district judge described as a "major drug ring." R. 335 at 2. Narcotics traffickers are often aware that their conversations might be overheard or intercepted, and so may choose their words carefully. In this case, Judge Lindberg found that "[t]he individuals conversing often did so in an ambiguous, guarded, and possibly coded manner . . ." Id. Consequently, the individuals monitoring such conversations cannot be expected to make snap judgments as to whether the subject of the conversation is within the scope of the intercept order. See Quintana, 508 F.2d at 874 ("It is all well and good to say, after the fact, that certain conversations were irrelevant and [monitoring] should have been terminated. However, the monitoring agents are not gifted with prescience and cannot be expected to know in advance what direction the conversation will take.") (internal quotation marks and citations omitted). A number of other courts have found that two to three minutes is a reasonable period of time within which to make an initial judgment as to the pertinence of a conversation. See United States v. Ozar, 50 F.3d 1440, 1448 (8th Cir.), cert. denied, 516 U.S. 871, 116 S. Ct. 193 (1995); United States v. Homick, 964 F.2d 899, 903 (9th Cir. 1992); United States v. Willis, 890 F.2d 1099, 1102 (10th Cir. 1989); United States v. Losing, 560 F.2d 906, 909 n.1 (8th Cir.), cert. denied, 434 U.S. 969, 98 S. Ct. 516 (1977); United States v. Armocida, 515

F.2d 29, 45 (3d Cir.), cert. denied, 423 U.S. 858, 96 S. Ct. 111 (1975); see also Bynum v. United States, 423 U.S. 952, 954, 96 S. Ct. 357, 358 (1975) (Brennan, J., dissenting from denial of certiorari) (noting that brief calls—apparently those of less than three minutes in duration--will generally not be subject to minimization). Moreover, because conversations among traffickers, as among others, may bounce among a variety of topics, periodic spot-checking of minimized conversations is not unreasonable either. See Ozar, 50 F.3d at 1448. Thus, the general parameters under which the government conducted the monitoring here were not inherently suspect. Moreover, we note that the government in the course of its electronic surveillance submitted periodic reports to Judge Aspen, a circumstance that suggests it conducted the surveillance in good faith. See Quintana, 508 F.2d at 875.

But whether, in practice, the government's actual minimization efforts were sufficient is not a point that we need to resolve, ultimately. The adequacy of the government's minimization efforts typically cannot be determined in a generalized fashion. See Scott, 436 U.S. at 140-41, 98 S. Ct. at 1724-25. Yet the defendants have framed their challenge in very broad terms. They appear to suggest, for example, that it was unreasonable for monitoring agents to listen to all calls for an initial two-minute period, apparently on the assumption that a speedier assessment as to the pertinence of the calls was possi-

ble in at least some instances. And, indeed, perhaps some of the intercepted conversations did lend themselves to simple and quick categorization as pertinent or non-pertinent, while others required a full two minutes or more to assess. See id. at 140-43, 98 S. Ct. at 1724-26; cf. Quintana, 508 F.2d at 874 (if a pattern of innocent conversations emerges, agents should cease monitoring such conversations; but such patterns will not always be identifiable). The point is, however, that we cannot know whether this is true without examining at least a sampling of the intercepted calls.

Likewise, whether the agents performed spot checks at intervals that were too frequent, and whether they listened for too long when they made those checks, is not a question that can be answered responsibly in the abstract. If, after a review of the intercepts, the defendants believed that the government's eavesdropping was too intrusive and that a greater degree of minimization was warranted, then it was incumbent upon them to identify at least a sample of intercepted calls that proves their point.

This they have not done. If the defendants were to prevail on their challenge, the appropriate relief likely would be to suppress any conversation or conversations that were inappropriately monitored. See 18 U.S.C. Â§ 2518(10)(a)(iii); Charles, 213 F.3d at 22 (partial suppression of those conversations intercepted improperly is the usual remedy for

inadequate minimization efforts; wholesale suppression of all intercepted conversations is reserved for the "particularly horrendous case"), quoting Hoffman, 832 F.2d at 1309; Ozar, 50 F.3d at 1448; see also United States v. Baltas, 236 F.3d 27, 32 (1st Cir.), cert. denied, 532 U.S. 1030, 121 S. Ct. 1982 (2001); United States v. Dorfman, 542 F.Supp. 345, 394-95 (N.D. Ill. 1982), judgment aff'd sub nom. United States v. Williams, 737 F.2d 594 (7th Cir. 1984), cert. denied, 470 U.S. 1003, 105 S. Ct. 1354, 1355 (1985). Judge Lindberg pointed out that the defendants had not identified any particular conversation that should have been minimized but was not or that should have been minimized to a greater degree than it was. R. 335 at 2. Even on appeal, the defendants do not identify any such conversation.

Nor do the defendants identify any concrete harms resulting from the admission of conversations which, in their view, should have been suppressed for want of appropriate minimization. Consequently, we have been deprived of the requisite basis for assessing the government's minimization efforts. For that reason, we need not, in the end, reach the merits of the minimization argument.

B. Anonymous Jury

On the government's motion, and over the defendants' objections, the district court decided not to disclose the names or the home and work addresses of prospective and empaneled jurors to the parties,

the public, or the media--a step that resulted in an anonymous jury. Judge Lindberg had initially denied the government's request for juror anonymity, remarking that he did not "see any need for it." R. 750, 1/12/98 Transcript ("Tr.") 27. After entertaining further argument on the matter, however, the judge acceded to the request. He cited the following circumstances in support of his ruling: (1) the defendants were involved in organized, violent street crime that had "elements of what is traditionally called organized crime," (2) with access to some 200 firearms, the defendants had the "capacity to harm jurors," (3) allegedly, some of the witnesses and their families had been threatened, (4) the defendants were subject to lengthy terms of incarceration and stiff monetary penalties if convicted, and (5) there would likely be press coverage--"perhaps not extensive, but significant, publicity"--regarding the case. Id. at 116-17. "So it's not the fact that it's a drug case or a firearms case," the judge explained, "but it is the fact that there appears to be organized activity on the part of the defendants and their associates and families that warrants the prophylaxis of juror anonymity." Id. at 117-18. Shortly before jury selection commenced, Judge Lindberg disavowed any reliance upon threats against witnesses and their families, explaining that his principal concerns about the prospect of interference with jurors were based on his experience with another trial involving the Gangster Disciples, a gang unrelated to

the Traveling Vice Lords. R.754-1, 1/20/98 Tr. at 6. This left the organized-crime aspect of the case as the sole basis for the court's decision in favor of juror anonymity. *fn5

In the midst of jury selection, defendant Young's counsel asked the court to give the members of the venire an instruction indicating that their names and addresses were being withheld for reasons other than their own safety, so as to allay any suspicions among prospective jurors that their anonymity might otherwise arouse and to thereby minimize the potential prejudice to the defendants. See United States v. Crockett, 979 F.2d 1204, 1216-17 (7th Cir. 1992), cert. denied, 507 U.S. 998, 113 S. Ct. 1617 (1993). The court agreed to give an instruction to the effect that the jurors' identifying information was being withheld in order to prevent the media from contacting them. R. 754-3, 1/22/98 Tr. 380. However, when the full venire was assembled for final questioning, the judge neglected to give the instruction, and the parties did not remind him to do so.

The defendants argue now, as they did below, that the circumstances confronting the court did not warrant an anonymous jury and that the court therefore abused its discretion in empaneling such a jury.

Noting that the district court also failed to deliver an appropriate ameliorative instruction, they contend that the defense was so prejudiced by the anonymity as to necessitate a new trial. Although

we agree that the court abused its discretion in empaneling an anonymous jury, see United States v. DiDomenico, 78 F.3d 294, 301 (7th Cir.), cert. denied, 519 U.S. 1006, 117 S. Ct. 507 (1996) (decision to empanel anonymous jury reviewed for abuse of discretion), in view of the district court's careful voir dire of prospective jurors and the overwhelming evidence of the defendants' guilt, we find the error harmless.

Empaneling an anonymous jury is an extreme measure that is warranted only where " 'there is strong reason to believe the jury needs protection.' " Crockett, 979 F.2d at 1215, quoting United States v. Paccione, 949 F.2d 1183, 1192 (2nd Cir. 1991), cert. denied, 505 U.S. 1220, 112 S. Ct. 3029 (1992). "An anonymous jury raises the specter that the defendant is a dangerous person from whom the jurors must be protected, thereby implicating the defendant's constitutional right to a presumption of innocence." United States v. Ross, 33 F.3d 1507, 1519 (11th Cir. 1994), cert. denied, 515 U.S. 1132, 115 S. Ct. 2558 (1995); see also United States v. Sanchez, 74 F.3d 562, 564 (5th Cir. 1996); United States v. Edmond, 52 F.3d 1080, 1090 (D.C. Cir.) (per curiam), cert. denied, 516 U.S. 998, 116 S. Ct. 539 (1995); United States v. Scarfo, 850 F.2d 1015, 1023-26 (3rd Cir.), cert. denied, 488 U.S. 910, 109 S. Ct. 263 (1988); United States v. Thomas, 757 F.2d 1359, 1363-65 (2nd Cir. 1985), cert. denied, 474 U.S. 819, 106 S. Ct. 66, 67 (1985), and cert.

denied, 479 U.S. 818, 107 S. Ct. 78 (1986). Juror anonymity also deprives the defendant of information that might help him to make appropriate challenges--in particular, peremptory challenges--during jury selection. DiDomenico, 78 F.3d at 301; Edmond, 52 F.3d at 1090.

Yet, neither the right to a presumption of innocence nor the right to exercise peremptory challenges is a constitutional absolute; each, at times, must yield to the legitimate demands of trial administration and courtroom security so long as steps are taken to ensure that the defendant receives a fair trial.Id.

A court weighing the need for an anonymous jury must therefore balance the defendant's interest in preserving the presumption of innocence and in conducting a useful voir dire against the jurors' interest in their own security and the public's interest in having a jury assess the defendant's guilt or innocence impartially. United States v. Amuso, 21 F.3d 1251, 1264 (2nd Cir.), cert. denied, 513 U.S. 932, 115 S. Ct. 326 (1994); accord Edmond, 52 .3d at 1090. Factors bearing on the propriety of an anonymous jury include the defendant's involvement in organized crime; his participation in a group with the capacity to harm jurors; whether he previously has attempted to interfere with the judicial process; the severity of the punishment that the defendant would face if convicted; and whether publicity regarding the case presents the prospect

that the jurors' names could become public and expose them to intimidation or harassment. Sanchez, 74 F.3d at 564, quoting United States v. Krout, 66 F.3d 1420, 1427 (5th Cir. 1995), cert. denied, 516 U.S. 1136, 116 S. Ct. 963 (1996); United States v. Darden, 70 F.3d 1507, 1532-33 (8th Cir. 1995), cert. denied, 517 U.S. 1149, 116 S. Ct. 1449 (1996), and cert. denied, 518 U.S. 1026, 116 S. Ct. 2567 (1996); Edmond, 52 F.3d at 1091; Ross, 33 F.3d at 1520.

We do not believe that the circumstances in this case warranted an anonymous jury. Although the case did involve elements of organized crime, "something more" than the organized-crime label is required in order to justify juror anonymity. As we explained in Crockett:

"[S]omething more" can be a demonstrable history or likelihood of obstruction of justice on the part of the defendant or others acting on his behalf or a showing that trial evidence will depict a pattern of violence by the defendant[ ] and his associates such as would cause a juror to reasonably fear for his own safety. 979 F.2d at 1216, quoting United States v. Vario, 943 F.2d 236, 241 (2nd Cir. 1991), cert. denied, 502 U.S. 1036, 112 S. Ct. 882 (1992).

In this case, the district court made no finding that the defendants had a history of intimidating witnesses or otherwise obstructing justice or that they were likely to do so in connection with this trial. Cf. DiDomenico, 78 F.3d at 301-02 (defen-

dants were connected to organized crime syndicate that had history of bribery and intimidation); Edmond, 52 F.3d at 1091-92 (one of defendants in narcotics conspiracy prosecution was also charged with murder, other defendants were implicated in that murder as well, and there was some evidence of planned and attempted witness intimidation); Crockett, 979 F.2d at 1216 (evidence indicated that one potential witness had been murdered and that attempts had been made to influence or intimidate other witnesses). True, the defendants may have had the ability to intimidate jurors through associates who were not incarcerated, but that is true of many defendants.

What demonstrates the need for jury protection is not simply the means of intimidation, but some evidence indicating that intimidation is likely. See, e.g., Darden, 70 F.3d at 1532-33; Ross, 33 F.3d at 1520-21; Vario, 943 F.2d at 240, 241. No such evidence is present here. Nor is there evidence that the defendants had engaged in a pattern of violence unusual enough to cause jurors to fear for their safety. Compare, e.g., Amuso, 21 F.3d at 1264-65 (indictment alleged that defendant was responsible for crimes of extreme violence, including murders of government witnesses).

Although the narcotics conspiracy in this case embraced a large-scale, gang-related operation with ready access to firearms, this is regrettably not uncommon in the drug trade. See, e.g., United States

v. Jones, 214 F.3d 836, 838 (7th Cir. 2000) ("guns are common in the drug trade"). The government has pointed to no evidence of violence of such a degree as to make this case unusual. The publicity surrounding the case was by no means extensive. Similarly, the fact that the defendants faced lengthy prison terms if convicted is hardly unusual--this is almost always true when a defendant has dealt in large quantities of narcotics. In short, that the defendants had the ability and incentive to threaten jurors, without additional evidence indicating that they were likely to act on that ability and incentive, was not enough to justify the unusual step of juror anonymity.

After a complete review of the record, however, we conclude that the error was harmless. We recognize that the Fifth Circuit has suggested that an erroneous decision to empanel an anonymous jury is not harmless where almost none of the pertinent factors supported that decision, but in so opining, that court left open the possibility that a harmless error analysis might be appropriate in a closer case. Sanchez, 74 F.3d at 565.

Notwithstanding our disagreement with the district court's decision, we believe this to be a closer case than our colleagues on the Fifth Circuit confronted in Sanchez. The conspiracy charged in this case did take on elements of organized crime; the defendants and their unindicted co-conspirators did use weapons and violence in furtherance of the con-

spiracy; the defendants faced very long prison terms upon conviction; and there had been some pre-trial publicity regarding the case. Although these circumstances were not, by themselves, sufficient to justify an anonymous jury, they demonstrate that the record was by no means devoid of a basis for concern for the security of the jurors. At the same time, Judge Lindberg conducted an extremely thorough voir dire of prospective jurors in this case over the course of three and one-half days. Juror anonymity is most concretely felt during the selection of the jury, when the withholding of identifying information makes it more difficult for the defense (and for that matter the prosecution) to make intelligent decisions as to which prospective jurors should be challenged or stricken peremptorily. See DiDomenico, 78 F.3d at 301; Crockett, 979 F.2d at 1216.

A conscientious voir dire compensates for this disadvantage by rooting out biases against the defendant or as to the issues presented in the case. Id. at 1216; see also Edmond, 52 F.3d at 1092-93; Ross, 33 F.3d at 1520.

The defendants have identified no aspect in which the district court's voir dire was wanting, and our own review of the trial transcript satisfies us that the voir dire was "searching and thorough." Crockett, 979 F.2d at 1216. In this way, the defendants' right to an unbiased jury was protected. Moreover, the court's instructions to the jury during

both voir dire and the trial emphasized that the defendants were presumed innocent and that the government bore the burden of proving them guilty beyond a reasonable doubt. See Crockett, 979F.2d at 1216; R. 350 at 5 ¶ 10; R. 351 at 5 ¶ 10; R. 352 at 5 ¶ 10; Tr. 15, 16, 5323. *fn6

Potential prejudice would have been further alleviated by an appropriate cautionary instruction regarding the anonymity of the jury. See, e.g., Crockett, 979 F.2d at 1216-17. However, despite Judge Lindberg's expressed willingness to give such an instruction, neither Young nor any of the other defendants reminded him to do so. Consequently, the defendants cannot properly complain about that omission now. See Varhol v. National R.R. Passenger Corp., 909 F.2d 1557, 1567-68 (7th Cir. 1990) (en banc) (per curiam); Palmquist v. Selvik, 111 F.3d 1332, 1343 (7th Cir. 1997). In view of the careful voir dire, together with what we believe to be the overwhelming evidence of defendants' guilt, we can discern no concrete way in which the anonymous jury deprived the defendants of a fair trial.

C. Admission of Officer Cronin's Testimony

Over the objections of the defense, the district court permitted Chicago Police Officer Michael Cronin, a gang specialist, to give opinion testimony regarding the history, leadership, and operations of the Traveling Vice Lords. Cronin testified that the TVLs controlled narcotics distribution on the west side of Chicago by means of a series of distribution

loci known as "drug spots." Tr. 1574. *fn7 Cronin went on to identify a number of locations that were, in his opinion, controlled by the TVLs, to describe how a "drug spot" operates, and to recount disputes between various factions of the Vice Lords over drug turf. Tr. 1575-82.

Cronin was also involved in the investigation that culminated in this prosecution; and he testified as a fact witness regarding surveillance in which he had participated, arrests he had made, various items of evidence that had been recovered, and to a statement that Cox made following his arrest. Tr. 1585-1628.

Although the defendants do not dispute Cronin's qualifications as a gang expert, they maintain that his testimony as to the TVLs' involvement in narcotics distribution amounted to inadmissible hearsay that was prejudicial in the sense that it related to a central issue in the case. Whereas the defendants posited that their narcotics activities reflected multiple, unrelated conspiracies, it was the government's theory that the defendants were involved in a unitary conspiracy that used the TVL organization to distribute cocaine and heroin. That theory was reflected in the superseding indictment, e.g., R. 133 at 2-3, as well as the prosecution's opening and closing statements, Tr. 19-20, 4982. In the defense view, Cronin's testimony as to the operation of the TVL drug distribution network went beyond the bounds of appropriate expert testimony, because

rather than helping the jury "to understand the evidence or to determine a fact in issue," Fed. R. Evid. 702, "it simply told them that if the defendants were associated with the TVL, they were part of a unitary conspiracy." Defendants' Joint Opening Br. at 36.

The defendants argue alternatively that even if Cronin's testimony qualified for admission under Rule 702, its potential for prejudicing the defense exceeded its probative value and therefore it should have been excluded pursuant to Federal Rule of Evidence 403. Non-expert, eyewitness testimony regarding the nature and operation of the TVL distribution network was perfectly comprehensible, the defendants insist, and so there was no need for expert testimony to help the jury understand this evidence. At the same time, they argue, the prejudicial effect of Cronin's testimony was "immense." Defendants' Joint Opening Br. at 39. Given his dual role as both a fact and an opinion witness, the defense postulates that the jury may have failed to appreciate when Cronin was testifying to facts based on his personal knowledge and when he was merely offering his opinion, and consequently may have given his opinions undue weight. This danger was particularly acute, the defendants reason, in view of the fact that the only eyewitness testimony concerning TVL operations came from former drug dealers who had an obvious incentive to cooperate with the government. Thus, the jury may have improperly

looked to Cronin's opinions as "facts" which corroborated the testimony of these less-than-upstanding witnesses. Although the district court gave a standard instruction admonishing the jury that it was not obliged to accept the opinion testimony of experts, Tr. 5328-29, the defendants point out that the instruction did not specifically advise the jury that Cronin's testimony regarding the operation of the TVL narcotics distribution apparatus constituted opinion, rather than fact, testimony.

We find no abuse of discretion in the district court's decision to permit Cronin to testify as an expert. The average juror is unlikely to be familiar with the operations of narcotics traffickers or of street gangs. See, e.g., United States v. Anderson, 61 F.3d 1290, 1297 (7th Cir.) (drug trafficking), cert. denied, 516 U.S. 1000, 116 S. Ct. 543 (1995); United States v. Johnson, 28 F.3d 1487, 1496-98 & nn. 9, 10 (8th Cir. 1994) (drug trafficking and gangs), cert. denied, 513 U.S. 1098, 115 S. Ct. 768 (1995), and cert. denied, 513 U.S. 1195, 115 S. Ct. 1263 (1995). Cronin's testimony supplied the jury with useful background concerning the history and structure of the TVLs, as well as with their involvement in narcotics activities.

At the same time, Cronin's testimony did not invite the jury to conclude that membership in the TVLs equated with participation in the charged conspiracy, as the defendants suggest. We can find nothing in Cronin's testimony which suggested that

all TVL members were involved in criminal activity generally or narcotics trafficking in particular. On the contrary, Cronin agreed on cross-examination that "membership in the Vice Lord Nation is not a crime," Tr. 1561, and that membership in a street gang "does not necessarily indicate that you are involved in illegal activities," Tr. 1643. See also Tr. 1733. In the same vein, the district court instructed the jury that "[I]t is not illegal to be a member of or associated with the Traveling Vice Lords." Tr. 5325.

Nor do we think it likely that Cronin's dual role as expert and fact witness would have led the jury to be confused as to which aspects of his testimony were opinions and which were factual in nature. Although we have acknowledged that there is a greater danger of undue prejudice to the defendants when a witness testifies as both an expert and a fact witness, United States v. Doe, 149 F.3d 634, 637 (7th Cir.), cert. denied, 525 U.S. 914, 119 S. Ct. 260 (1998), we have also indicated that a police officer may permissibly testify in both capacities, United States v. Lightfoot, 224 F.3d 586, 588-89 (7th Cir. 2000), cert. denied, 532 U.S. 976, 121 S. Ct. 1611 (2001). The potential for prejudice in this circumstance can be addressed by means of appropriate cautionary instructions and by examination of the witness that is structured in such a way as to make clear when the witness is testifying to facts and when he is offering his opinion as an expert. See

United States v. Lipscomb, 14 F.3d 1236, 1242 (7th Cir. 1994); United States v. Foster, 939 F.2d 445, 453 (7th Cir. 1991). In this case, the government structured its direct examination of Cronin in such a way as to separate his opinions as an expert from his factual observations as an occurrence witness, compare Tr. 1569-84 with Tr. 1586-1628; and both the objections that the defense posed at the transition from opinion to fact as well as the remarks that the district judge made in response to those objections served to highlight the distinction, see Tr. 1586-88. Cronin was also extensively voir dired by the defense as to the basis for his opinions, see Tr. 1529-32, 1542-64, which again made clear to the jury the distinction between the two aspects of his testimony. Finally, the court reminded the jurors that "the fact an expert has given an opinion does not mean that it is binding upon you or that your are obligated to accept the expert's opinion as to the facts." Tr. 5329. Under these circumstances, we see no real possibility that the jury may have been led to mistakenly credit Cronin's opinions as facts.

D. Jury Instruction--Conviction or Acquittal

After outlining the two principal elements of the conspiracy charge for the jury, the district court gave the following pattern instruction:

If you find from your consideration of all the evidence that both of these propositions [have] been proved beyond a reasonable doubt with regard to

the defendant you are then considering, then you should find that defendant guilty.

If, on the other hand, you find from your consideration of all of the evidence that either of these propositions has not been proved beyond a reasonable doubt as to the defendant you are then considering, then you should find that defendant not guilty. Tr. 5331.

The court repeated this same instruction with respect to each count of the indictment. Tr. 5334, 5336-37, 5338-39.

The defendants argue that the language of this instruction was flawed to the extent that it advised the jury that it "should" rather than "must" acquit a defendant if it found that the government had not proved the elements of the crime charged beyond a reasonable doubt. "Should," in the defendants' view, is a permissive term, suggesting that the jury had discretion whether or not to find a defendant not guilty even if the government had not met its burden of proof. Of course, if it is reasonably likely that the jury understood the instructions to permit conviction on something less than proof beyond a reasonable doubt, it constituted reversible error. See Victor v. Nebraska, 511 U.S. 1, 6, 114 S. Ct. 1239, 1243 (1994). However, the defendants did not object to the instruction in the district court, so we may reverse only if the flaw in the instruction, if any, amounts to plain error. E.g., United States v. Inglese, 282 F.3d 528, 536-37 (7th Cir. 2002).

Our opinion in United States v . Kerley, 838 F.2d 932 (7th Cir. 1988), makes clear that the language at issue was not plainly erroneous.

In that case as in this one, the defendant argued that the use of the term "should" gave the jury license to convict the defendant even if the government had not established his guilt beyond a reasonable doubt. We flatly rejected that argument:

Least of the alleged trial errors is the judge's having instructed the jury that they "should" rather than "must" acquit Kerley in the event the government had failed to prove his guilt beyond a reasonable doubt.

"Must" is preferable; but it is hardly plausible that the jury supposed that while they "should" acquit Kerley if he was not guilty beyond a reasonable doubt, they didn't have to acquit him if they didn't want to.

Juries know better than that. We add that the judge also said that the jury "should," not "must," convict Kerley if they found that he was guilty beyond a reasonable doubt. In context, "should" was imperative--not hortatory-throughout the instruction. Id. at 940.

Although the defendants suggest that the Supreme Court's opinions in Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078 (1993), and Victor have undermined our decision in Kerley, we disagree. The instruction at issue here did not misdescribe the burden of proof, as was the case in Sul-

livan, see 508 U.S. at 277-78, 113 S. Ct. at 208081. The jury was properly informed that the government was obliged to prove the defendants guilty beyond a reasonable doubt. Tr. 5323. Moreover, the Court in Victor described the constitutional question raised by flawed language regarding the burden of proof as "whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the Winship [reasonable doubt] standard. 527 U.S. at 6, 114 S. Ct. at 1243; see In re Winship, 397 U.S. 358, 90 S. Ct. 1068 (1970). That is the very question we answered in Kerley vis a vis use of the term "should"--and we found it implausible that the jury believed acquittal was optional if the government failed to meet its burden of proof. 838 F.2d at 940; see also United States v. Ray, 238 F.3d 828, 834-35 (7th Cir.), cert. denied, 532 U.S. 1045, 121 S. Ct. 2014 (2001).

Accordingly, we find no plain error in the language of this instruction.

E. Multiple Conspiracies Instruction

As we have noted, it was the defense theory in this case that the defendants had not joined a unitary conspiracy but at most had participated in a number of smaller, unrelated conspiracies. The district court delivered the following instruction on the subject of multiple conspiracies:

The indictment charges that the defendants participated in a single conspiracy to distribute illegal narcotics.

Proof that there were multiple conspiracies is not necessarily proof of a single conspiracy, nor is it necessarily inconsistent with the existence of a single conspiracy.

If you do not find beyond a reasonable doubt that a particular defendant was a member of any conspiracy, you should find that defendant not guilty of Count 1 [the conspiracy charge].

If you find beyond a reasonable doubt that there was one overall conspiracy as alleged in Count 1, and that a particular defendant was a member of that conspiracy, then you should find that defendant guilty of Count 1.

If you find beyond a reasonable doubt that there were two or more conspiracies, and that a particular defendant was a member of or aided and abetted one or more conspiracies, you may find that defendant guilty of Count 1, if you further find beyond a reasonable doubt that this proven conspiracy was included within the conspiracy alleged in Count 1.

If, on the other hand, the proven conspiracy is not included within the conspiracy alleged in Count 1, you should find the defendant not guilty of Count 1. Tr. 5332-33.

The defendants argue that this instruction deprived them of their Fifth Amendment right to due process, and to their Sixth Amendment right to trial

by jury, because although it required each juror to find that a defendant had participated either in the conspiracy alleged in the indictment or a lesser conspiracy included within the charged conspiracy, it did not state that the members of the jury must agree on which conspiracy the defendant had joined.

As the defendants acknowledge, however, we approved a virtually identical instruction in United States v. Wilson, 134 F.3d 855, 865 (7th Cir.), cert. denied, 525 U.S. 894, 119 S. Ct. 216 (1998). We noted:

[The instruction] informed the jury that, if it found that a defendant was a member of a conspiracy that constituted a sub-part of the conspiracy charged in the indictment, then it should find that defendant guilty. The jury's finding of guilt therefore concluded that the [defendants] were members of a conspiracy and that, at a minimum, this conspiracy was part of the single conspiracy alleged by the Government. Id. at 865.

That the jurors were not informed they must agree on exactly which conspiracy the defendant agreed to join does not present a constitutional problem. Even if the jurors were of different minds as to the precise parameters of the conspiracy, the instruction required them all to agree that the defendant joined a conspiracy that was within the ambit of the conspiracy alleged in the indictment. In short, with respect to the essential elements of the crime

(the existence of a conspiracy, and the defendant's agreement to join it), the instruction appropriately required unanimity. See Richardson v. United States, 526 U.S. 813, 817, 119 S. Ct. 1707, 1710 (1999).

Moreover, even if the instruction were defective as the defendants suggest, the error was harmless. The evidence overwhelmingly demonstrated that the defendants participated in a unitary conspiracy to traffic in narcotics, pursuant to which Bahman and Mohammad Mansoori supplied the drugs to Young, who in turn, with the assistance of Cox and Choice, distributed them through a network of drug spots.

F. Failure to Submit Drug Quantity to Jury

The district court sentenced defendants Young, Mohammad Mansoori, Cox, and Choice to terms of life imprisonment based on its finding that they conspired to distribute more than 150 kilograms of cocaine. See, e.g., R. 745-3, Young Sentencing Tr. 35-37; R. 730, Cox Sentencing Tr. 21, 23-24; R. 748, Choice Sentencing Tr. 17-18. The various subsections of 21 U.S.C. § 841(b)(1) set forth a number of different minimum and maximum sentences depending on the amount of drugs involved, and subsection (A) specifies a maximum prison term of life for narcotics offenses involving five or more kilograms of cocaine or one or more kilograms of heroin. However, pursuant to the Supreme Court's opinion in Apprendi v. New Jersey, 530 U.S. 466,

120 S. Ct. 2348 (2000), the indictment must allege, and a jury must unanimously find, that the offense involves that threshold amount before the court may sentence a defendant to the life term authorized by section 841(b)(1)(A). See, e.g., United States v. Smith, 241 F.3d 546, 547 (7th Cir.), cert. denied, 122 S. Ct. 267 (2001). In the absence of a jury finding, the default statutory maximum for cases in which no particular quantity of narcotics is proven--the twenty year maximum provided for in section 841(b)(1)(C)-applies. *fn8 In this case, the jury was not asked to decide whether the conspiracy involved any particular drug amount; on the contrary, the court instructed the jury that "[t]he Government does not have to prove the amount of controlled substances alleged in the indictment," Tr. 5335, but rather it need only determine that the offenses charged in Count 1 (the conspiracy charge) and Count 2 (a substantive charge of distribution against defendants Young and Choice) involved "a measurable amount" of narcotics, id. Accordingly, the district court, which sentenced the defendants before the Supreme Court decided Apprendi, erred in imposing any sentence in excess of the default maximum of twenty years. As this issue was not raised below, however, the mistake must qualify as "plain" before the defendants are entitled to relief. United States v. Nance, 236 F.3d 820, 823-24 (7th Cir. 2000), cert. denied, 122 S. Ct. 79 (2001).

Because we do not believe that the sentencing error affected the fairness, integrity, or public reputation of the proceedings below, see United States v. Johnson, 520 U.S. 461, 467, 117 S. Ct. 1544, 1549 (1997), we conclude that the error does not constitute "plain" error. Having reviewed the record, we are convinced that upon a properly worded indictment, a properly instructed jury would have found the defendants guilty of distributing the requisite threshold quantities of narcotics. See Nance, 236 F.3d at 825-26. The jury convicted the defendants on the conspiracy charge, and the record leaves no doubt that the conspiracy involved the distribution of far more than five kilograms of cocaine and/or one kilogram of heroin. Indeed, the trial evidence readily confirms the trial court's finding that the defendants who received life terms were responsible for the distribution of at least 150 kilograms of cocaine. For example, co-conspirator Billy Carter testified that in 1994 he and Young had retrieved a twenty-to thirty-kilogram quantity of cocaine from Mohammad Mansoori--whom Carter knew as "Moe"--, which cocaine was then passed along in five-or ten-kilogram quantities to other TVL members, including defendants Cox and Choice. Tr. 690-97. Carter said that he retrieved comparable quantities of cocaine from Mansoori more than five times in 1994 and 1995. Tr. 1052-53. Carter further testified that he alone was distributing three to five kilograms of cocaine per week in 1992, and five to

ten kilograms weekly in 1993 and 1994--which yields a total of several hundred kilograms. Tr. 1119-22. *fn9 In a similar vein, Leslie Teague testified that he and coconspirator Andre Donaldson obtained about five kilograms of cocaine per week from Young during the first few months of 1994 for distribution in the Quad Cities area of Illinois. Tr. 2090. (Carter testified that he and Choice delivered ten kilograms of cocaine to Teague on one occasion in 1993 or 1994. Tr. 696-99.) The evidence concerning heroin distribution similarly confirms that the conspirators were dealing in large quantities. TVL member Anthony Buchanan, for example, who shared a drug spot with Carter, testified that he obtained quantities of between 100 and 800 grams of heroin from Mohammad Mansoori and his "runner" John Hunt once or twice weekly in 1996. Tr. 1844-50. Carter testified that he was distributing 100 grams of heroin per day in that same year. Tr. 1117-18. Terry Bronson testified that Choice had him deliver 2.4-gram "packs" of heroin (twenty-four bags, each containing 0.1 gram of heroin) to the Henry Horner Homes on a daily basis from February to October 1996 (yielding a total of more than 500 grams). Tr. 342-43. Thus, the evidence before the jury consistently and overwhelmingly demonstrated that the defendants were distributing cocaine and heroin on a very large scale. In view of that evidence, there can be no doubt that the jury would have found that the offense involved the threshold

amount of five kilograms of cocaine and/or one kilogram of heroin as necessary to authorize prison terms of life for defendants Young, Mohammad Mansoori, Cox, and Choice. See Nance, 236 F.3d at 826.

G. Erroneous Life Sentences on Count Two

Count Two of the superseding indictment charged Young and Choice (among others) with the distribution of one kilogram of cocaine in the October 31, 1996 transaction described at the outset of this opinion. R. 133 at 5.

Pursuant to 21 U.S.C. § 841(b)(1)(B)(ii), the maximum prison term that could ever be imposed on this count was forty years because the underlying conduct involved more than 500 grams of cocaine but less than five kilograms. The district court, however, erroneously sentenced Young and Choice to life terms on this count. The government concedes the error. Gov. Br. 56 & n.28. Accordingly, we shall remand the case to the district court for resentencing on this count.

Because the jury was not asked to determine whether the defendants were responsible for distributing anything more than a "measurable amount" of cocaine, Tr. 5335, in accord with Apprendi the district court on remand may not impose a sentence in excess of twenty years on Count 2. See 21 U.S.C. § 841(b)(1)C). It may well be true, as the Government contends, that the jury inevitably would have found Young and Choice responsible for distributing a

kilogram of cocaine, thus triggering the forty-year maximum, had it only been asked to do so. That point would only be relevant, however, if we were deciding whether a forty-year term, imposed without the quantity finding that Apprendi requires, amounted to harmless error. In this case, because the district court imposed a life term on Count 2 (a term that would be erroneous regardless of whether the jury had found the defendants named in this count responsible for a kilogram quantity of cocaine), re-sentencing is mandated. When it imposes the new sentence, the district court will of course be obliged to honor Apprendi.

Because the jury did not render a quantity finding, as Apprendi requires, the maximum term that the district court may impose on remand is the default maximum term of twenty years specified in section 841(b)(1)(C).

H. Erroneous Special Assessments

The district court imposed special assessments of $100 as to Mohammad Mansoori on Counts 3 through 13 and Young on Count 14. Because these monetary offenses were committed prior to April 24, 1996 (see R. 133 at 6, 8), when the applicable special assessment was raised from $50 to $100, only a $50 special assessment could be imposed. E.g., United States v. Gricco, 277 F.3d 339, 363-64 (3rd Cir. 2002); United States v. Prather, 205 F.3d 1265, 1272 (11th Cir.), cert. denied, 531 U.S. 879, 121 S. Ct. 188 (2000). Accordingly, we

shall also remand for re-sentencing in this regard as well.

I. Admissibility of Cox's Post-Arrest Statement

After a federal grand jury indicted Cox and his co-defendants, a federal warrant was issued for his arrest. At 10 p.m. on a Saturday evening, Chicago police officers arrested Cox on that warrant. Chicago police officer and gang specialist Michael Cronin (who had participated in the investigation that culminated in Cox's arrest) interviewed Cox later that evening and obtained a waiver of Cox's Miranda rights. Tr. 1607-13.

Cox eventually admitted to Cronin that he was a high-ranking TVL member who was involved in the distribution of cocaine on Chicago's west side. Tr. 1609-12. The Chicago Police Department has special rules and procedures that apply when an individual is arrested pursuant to a warrant issued by another jurisdiction. See Tr. 1612-13. Apparently because Cox's arrest took place on the weekend, it took some time to comply with these rules, and Cox was not turned over to federal authorities until the following Monday morning, at 7:00 a.m. Cox arrived at the Dirksen Federal Building in Chicago at approximately 7:30 a.m. Apparently, when the government inquired into the possibility of bringing Cox before a judicial officer, Judge Lindberg's chambers instructed the government to bring him before Judge Lindberg that afternoon at 1:30. At approximately 8:30 a.m., Officer Robert Grapen-

thein (another Chicago police offer and gang specialist who had been detailed to the FBI gang task force and who had participated in the investigation of this case) played for Cox some of the incriminating tapes produced by the government's surveillance and then proceeded to interview him. Cox again waived his Miranda rights and again confessed his involvement with the TVL and with narcotics distribution. Tr. 1446-53, 1456-58. Not until 1:30 p.m. that afternoon, some 39 hours after his arrest, did Cox appear before a judicial officer (Judge Lindberg) for arraignment. R. 259.

Because Cox made his second confession more than thirty hours after his arrest and before the government brought him before a judicial officer, Cox moved to suppress the confession. In relevant part, Federal Rule of Criminal Procedure 9(c)(1), which deals with the execution of federal warrants, requires that an individual arrested on a warrant be taken before a judicial officer promptly:

The officer executing the warrant shall bring the arrested person without unnecessary delay before the nearest available federal magistrate judge or, in the event that a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041.

(Rule 5(a) sets forth a similar requirement for an arrest pursuant to a warrant issued upon a complaint.) In McNabb v. United States, 318 U.S. 332, 344-47, 63 S. Ct. 608, 614-16 (1943), and again in

Mallory v. United States, 354 U.S. 449, 455-56, 77 S. Ct. 1356, 1360 (1957), the Supreme Court held that unreasonable pre-interview delays in arraigning the defendants (two days in McNabb, seven hours in Mallory) rendered the confessions made on the heels of and as a result of those delays inadmissible at trial.

In the wake of Mallory, Congress established a six-hour "safe harbor" for post-arrest statements:

In any criminal prosecution by the United States . . . a confession made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law enforcement officer or law enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate judge or other officer empowered to commit persons charged with offenses against the laws of the United States . . . if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention . . . . 18 U.S.C. § 3501(c).

A voluntary confession that occurs within this six-hour "safe harbor" is therefore admissible notwithstanding a delay in bringing the defendant before a judicial officer. This provision embraces Cox's first confession (to Cronin) but not his second

(to Grapenthein), which occurred more than thirty hours after his arrest but before he was arraigned. A voluntary confession that occurs after the six-hour safe-harbor period may be inadmissible pursuant to McNabb, Mallory, and their progeny. Exclusion is not automatic but discretionary, turning on "a congeries of factors, including such elements as the deterrent purpose of the exclusionary rule, the importance of judicial integrity, and the likelihood that admission of evidence would encourage violations of the Fourth Amendment." United States v. Gaines, 555 F.2d 618, 623-24 (7th Cir. 1977); see also United States v. Spruill, 296 F.3d 580, 590 (7th Cir. 2002).

The district court denied Cox's motion to suppress for two reasons. First, the court reasoned that because Cox had been in federal custody for less than six hours at the time he gave his statement to Grapenthein, his confession fell within the safe harbor notwithstanding the period of time he spent in the custody of the Chicago police before he was handed over to federal officials. R. 332. Second, the court found that Cox had not been detained in state custody as long he was in order to help federal officials to obtain a confession from him. Id.; cf. Gaines, 555 F.2d at 625 (if defendant had shown that federal agents colluded with local police to keep in custody in order to obtain a confession from him, suppression would be required).

The first of these reasons was erroneous as a matter of law. As the government rightly points out, the six-hour clock begins to run for purposes of section 3501(c) when the individual is arrested or otherwise detained for a violation of federal law, not when he is taken into federal custody. United States v. Alvarez-Sanchez, 511 U.S. 350, 358, 114 S. Ct. 1599, 1604 (1994); compare United States v. Rowe, 92 F.3d 928, 932-33 (9th Cir. 1996) (defendant initially taken into custody on state charge), cert. denied, 519 U.S. 1100, 117 S. Ct. 785 (1997). Although it was the Chicago police who arrested Cox, they did so pursuant to a federal arrest warrant.

Consequently, the statutory clock began to run on Saturday evening, when Cox was arrested, not on Monday morning, when he was transferred to federal custody. As the clock had been running for approximately thirty-six hours by the time Cox confessed his culpability to Grapenthein, his confession is not protected by the statutory safe harbor.

We must, consequently, consider the reasons for the additional delay (that is, beyond the six-hour safe-harbor period) in bringing Cox before a judicial officer and whether that delay was reasonable, along with the other factors cited by Gaines. The government notes that the bulk of the delay was due to the fact that Cox was arrested on a Saturday evening by the Chicago police, whose rules regarding arrests on warrants issued by other jurisdictions required additional processing time before he was re-

leased into federal custody. Once Cox was turned over to federal officials, the government notes, it inquired about bringing him before a judicial officer and was instructed by Judge Lindberg to present him for arraignment at 1:30 p.m. Further, there are no allegations that Cox was in any way subject to the kind of "third degree" interrogation tactics that concerned the Supreme Court in McNabb. Finally, in view of the district court's finding that the delay in arraigning Cox was not due to a desire to secure his confession, the government argues that exclusion of his statement to Grapenthein would not serve the deterrent purposes of the exclusionary rule.

Although we accept the district court's finding that there was no coordinated effort between state and federal officials designed to keep him in state custody for a prolonged period in order to facilitate his confession, *fn10 we are nonetheless troubled by the decision to interview him for a second time well outside of the safe-harbor period and before he was finally arraigned. By the time Grapenthein interviewed Cox on Monday morning, the government was aware that Cox had been in custody for more than thirty hours, that he had not yet seen a judicial officer, and that he would not be arraigned until that afternoon. Nonetheless, the government evidently made a deliberate decision to interview Cox at that time, rather than wait until he had been arraigned.

Perhaps the government, but for the district court's decision to have Cox arraigned that afternoon, would have brought him before a duty magistrate that morning (certainly there was one available) and interviewed him following the arraignment. But once instructed by the district court to present Cox that afternoon, and in the absence of any apparent exigency necessitating an immediate interview, the advisable course would have been to put the interview on hold until Cox had been arraigned. The prompt-appearance requirement serves to protect the defendant's rights and to interpose a check on law enforcement zeal by ensuring the timely intervention of a judicial officer who can confirm that the defendant has been advised of his rights, that he has been detained on probable cause, and so on. See McNabb, 318 U.S. at 343-44, 63 S. Ct. at 614-15. That purpose was not served by the decision to interview Cox at a point when there had already been a substantial delay in bringing him before a judicial officer and his belatedly scheduled appearance was but a few hours hence.

We impute no actual motives to the government that were malevolent; but objectively the decision to proceed with the interview on Monday morning was unreasonable, and in the absence of a more developed record as to the circumstances surrounding that decision, it gives rise to an impression that the government was attempting to take advantage of the

delay in arraigning Cox. Under these circumstances, the decision to elicit a second statement from Cox appears improper. At the same time, exclusion of this statement would serve efficaciously the deterrent purposes of the exclusionary rule by encouraging the government to bring an arrested individual before a magistrate or judge more promptly. See generally Arizona v. Evans, 514 U.S. 1, 10-11, 115 S. Ct. 1185, 1191 (1995); United States v. Leon, 468 U.S. 897, 918-20 & n.20, 104 S. Ct. 3405, 3418-19 & n.20 (1984); see also, e.g., McNabb, 318 U.S. at 344-45, 63 S. Ct. at 615; United States v. Wilbon, 911 F. Supp. 1420 (D. N.M. 1995). Based on the record before us, we therefore find that the admission of Cox's second confession (to Grapenthein) was erroneous; that confession should have been suppressed.

Under the circumstances, however, we find the error to be harmless. As we have noted, Cox confessed his involvement in narcotics distribution not only to Grapenthein, but to Cronin, who inteviewed him on Saturday evening shortly after his arrest, within the six-hour safe harbor. Cox's first confession was recounted by Cronin at trial, and Cox does not contest the admissibility of that confession. The first confession overlapped in material respects with the second. Compare Tr. 1443-58 with Tr. 1607-13, 1637-41. Indeed, in objecting to Cronin's testimony regarding the first confession (as it turned out, Cronin testified after Grapenthein did), Cox's counsel

argued that Cronin's testimony was unnecessary to the government's case in view of the overlap. Tr. 1516-17. Accordingly, the second confession, although inadmissible for the reasons we have discussed, did not unduly prejudice Cox. See Boles v. Foltz, 816 F.2d 1132, 1135-36 (6th Cir.) (even if it was error to admit second confession elicited improperly after defendant had requested attorney, error was harmless because, inter alia, second confession was cumulative of first), cert. denied, 484 U.S. 857, 108 S. Ct. 167 (1987).

J. Cox's Post-Arrest Statement and Young's Confrontation Rights

Among other things, Cox's post-arrest confession to Grapenthein indicated that he was assigned responsibility for cocaine sales in a particular area of Chicago by "members within the Traveling Vice Lords that were above him." Tr. 1451. Grapenthein, of course, repeated this statement at trial. Id. Before Grapenthein testified, the court instructed the jury to consider his testimony about Cox's statement "only in connection with the Government's case against Defendant Mark Cox." Tr. 1443. Again in the final jury charge, the court admonished the jury to consider Cox's confession "only with regard to the Defendant Mark Cox and not against any other defendant." Tr. 5326. Young nonetheless argues that the admission of Cox's confession ran afoul of Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620 (1968). Young reasons that Cox's reference to

the TVL members "above him" necessarily inculpated Young, because Young was the only indicted TVL member who was superior to Cox in the gang's hierarchy. Young asked the district court to declare a mistrial on the basis of Bruton, but the court denied the motion. *fn11

The admission of Cox's post-arrest statement did not run afoul of Bruton. Bruton held that the admission into evidence of a co-defendant's confession violates the defendant's rights under the Confrontation Clause of the Sixth Amendment when the confession incriminates the defendant as well. 391 U.S. at 135-36, 88 S. Ct. at 1627-28. However, as the Court's subsequent opinion in Richardson v. Marsh makes clear, the co-defendant's confession must implicate the defendant directly to give rise to a Bruton violation. 481 U.S. 200, 208, 107 S. Ct. 1702, 1707-08 (1987). If the confession incriminates the defendant only "when linked with evidence introduced later at trial," id. at 208, 107 S. Ct. at 1707, then a limiting instruction confining the jury's consideration of the statement to the confessing co-defendant likely will suffice to protect the defendant's rights. Id. at 208, 211, 107 S. Ct. at 1708, 1709; see also, e.g., United States v. Chrismon, 965 F.2d 1465, 1471-73 (7th Cir. 1992).

That is the case here. Cox's statement implicated Young indirectly at best. Cox's reference to persons "above him" in the TVL hierarchy did not point unambiguously to Young. Only in light of other evi-

dence revealing Young to have been superior to Cox in the TVL hierarchy might the jury have inferred that Young was among the individuals that assigned Cox his territory. Even then, the inference was not inevitable--by referring to multiple TVL "members" who gave him his authority, Cox did not purport to single out any particular individual. Under the circumstances, the district court's instructions limiting consideration of Cox's confession to Cox alone was sufficient to protect Young.

K. Denial of Bahman Mansoori's Motion to Sever

Bahman Mansoori asked the district court to sever his trial from that of the other defendants. His argument then, as now, was that the evidence against the other defendants was much stronger than it was against him, and that he faced a particular danger of the jury inferring guilt by association in view of the fact that his brother Mohammad played a key role in the conspiracy as the individual who supplied narcotics to Young and there was also evidence that another Mansoori brother was also involved in drug trafficking. The district court denied the motion to sever, reasoning that the jury was capable of assessing the guilt or innocence of each defendant independently at a joint trial and that severance would require the government to duplicate much of its case at multiple trials. R. 742-1, 12/18/97 Tr. at 67-68; R. 301. We review the district court's decision for abuse of discretion. E.g.,

United States v. Wilson, 237 F.3d 827, 835 (7th Cir.), cert. denied, 122 S. Ct. 97 (2001).

In order to secure a new trial, the defendant must demonstrate that the joint trial caused him "actual prejudice," i.e., that he was deprived of a fair trial by virtue of the district court's refusal to sever. Id.

The district court did not abuse its discretion in denying Bahman's motion. As the government points out, Bahman did not join the conspiracy until November 1996, and it is his late joining that accounts for the fact that there was less evidence regarding his participation than there was against the other co-defendants. But the evidence leaves no doubt that he was a full participant in the conspiracy once he joined. A number of the tape recorded conversations among members of the conspiracy reveal Bahman discussing various narcotics transactions, for example. John Hunt also testified that he had picked up narcotics from Bahman at Bahman's apartment, and had dropped off payments there as well. The cases affirming joint trials under such circumstances, notwithstanding the different degrees of involvement among various co-conspirators and the different magnitudes of evidence against each defendant, are legion. E.g., United States v. Smith, 995 F.2d 662, 671 (7th Cir. 1993), cert. denied, 510 U.S. 1056, 114 S. Ct. 718 (1994); United States v. Goines, 988 F.2d 750, 781 (7th Cir.), cert. denied, 510 U.S. 887, 114 S. Ct. 241 (1993), and cert.

denied, 510 U.S. 982, 114 S. Ct. 483 (1993), and cert. denied, 510 U.S. 985, 114 S. Ct. 558 (1993); United States v. Cochran, 955 F.2d 1116, 1120-21 (7th Cir.), cert. denied, 506 U.S. 972, 113 S. Ct. 460 (1992); United States v. Pace, 898 F.2d 1218, 1245-46 (7th Cir.), cert. denied, 497 U.S. 1030, 110 S. Ct. 3286 (1990), and cert. denied, 498 U.S. 878, 111 S. Ct. 210 (1990); United States v. Briscoe, 896 F.2d 1476, 1516-17 (7th Cir.), cert. denied, 498 U.S. 863, 111 S. Ct. 173 (1990).

Bahman has not demonstrated that there was such a great disparity in the evidence that he could not have received a fair trial without a severance. See United States v. Moya-Gomez, 860 F.2d 706, 754 (7th Cir. 1988), cert. denied, 492 U.S. 908, 109 S. Ct. 3221 (1989). The district court properly instructed the jury to consider each defendant's culpability separately, Tr. 977-78, 5326-27, and we presume that the jury followed that instruction, see, e.g., United States v. Thompson, 286 F.3d 950, 968 (7th Cir. 2002).

L. Admission of Tape Recordings and English Translations of Telephone Conversations in Farsi

Among the intercepted and recorded conversations that the district court admitted into evidence at trial were a series of conversations in Farsi. FBI language specialist Behrooz Sarshar listened to these recordings over a period of two months and prepared English translations of the conversations that were also introduced into evidence at trial. The

transcripts identified Mohammad and Bahman Mansoori as participants in these conversations. Sarshar testified that having listened to the tapes over a two-month period, and having heard the two Mansoori brothers speak at a court proceeding that took place in advance of trial, he was able identify the voices on the tapes as belonging to Mohammad and Bahman Mansoori. Tr. 2491-2501; see also Tr. 2627. The Mansooris contend that the tape recordings and translations were inadmissible because, in their view, Sarshar lacked an adequate basis upon which to identify the voices on the recordings as theirs.

We believe that the tapes and translations were properly admitted. Federal Rule of Evidence 901(b)(5) permits a witness to identify a voice "based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." (Emphasis supplied.) Nothing in the rule, therefore, would preclude a witness from identifying the participants in a tape-recorded conversation based on listening to those individuals participate in a court proceeding. Granted, Sarshar only had one opportunity to hear Bahman and Mohammad Mansoori speak in a setting that disclosed their identities. However, we have held that an individual's "minimal familiarity" will suffice to permit him to identify a speaker's voice. United States v. Saulter, 60 F.3d 270, 276 (7th Cir. 1995); United States v. Degaglia, 913 F.2d 372, 376 (7th Cir. 1990); United

States v. Alvarez, 860 F.2d 801, 809 (7th Cir.1988), cert. denied, 493 U.S. 829, 110 S. Ct. 97 (1989). Having reviewed the record, we are inclined to agree with the Mansooris that the basis for Sarshar's identification was relatively weak. Yet, we cannot say as a matter of law that the brief opportunity Sarshar had to hear the defendants in court was insufficient to permit his voice identification. The accuracy of his identification, of course, was a question for the jury, e.g., Degaglia, 913 F.2d at 376 n.3, and the jury was properly advised on that point, Tr. 5341-42.

Moreover, as the government points out, other evidence circumstantially supported Sarshar's attributions. See Alvarez, 860 F.2d 809. First, coconspirator John Hunt identified the Mansoori brothers as the speakers in one of the conversations in which he had participated. Tr. 2702-03. Moreover, Officer Grapenthein had heard Mohammad Mansoori conduct a number of conversations in English on the same phone from which the Farsi conversations were intercepted, Tr. 2347, and for that reason one might reasonably infer (as he did) that Mohammad Mansoori was one of the participants in the Farsi conversations. Indeed, the subscriber for the telephone from which the Farsi conversations were intercepted was listed as "Anthony Mirabelli," a name that the evidence revealed to be an alias used by Mohammad Mansoori; and a bill for that telephone was found in a search of Moham-

mad's home. Tr. 2294-95, 336568. Finally, a number of the intercepted conversations in Farsi were placed from a cellular telephone that was discovered in Bahman Mansoori's apartment and for which service had been arranged by Bahman's girlfriend. Tr. 2357-58, 3203-06, 3536-3538, 3632-35.

M. Evidence of Prior, Narcotics-Related Forfeiture of Mohammad Mansoori's Assets

In 1990, an undercover Illinois state police officer arranged to sell 60 kilograms of cocaine to Jamshid Mansoori (brother to Mohammad and Bahman) for $1.3 million. When the officer arrived at a prearranged location to consummate the deal, Jamshid indicated that he had only $350,000 with him, but that his brother would be arriving shortly with the balance of the purchase money. Mohammad joined the other two thereafter and displayed a gym bag to the officer containing many bundles of currency.

Jamshid and Mohammad Mansoori were arrested and charged with narcotics trafficking, and eventually they pleaded guilty. Pursuant to the plea agreement, they forfeited the two automobiles that they had driven to the meeting with the undercover officer, some $263,000 in cash, and "several hundred items of jewelry." Tr. 2979.

The district court admitted testimony concerning the 1990 offense and Mohammad's forfeiture of assets pursuant to his guilty plea under Federal Rule of Evidence 404(b). The court instructed the jury that this testimony was admitted insofar as it bore

upon Mohammad's intent to conspire to distribute narcotics and on his ability, intent, and knowledge to launder drug proceeds, and that the evidence was to be considered in these respects alone. Tr. 2969. The undercover officer who participated in the transaction then briefly described the details of the crime and Mohammad's forfeiture of assets. Tr. 2969-79. An expert in the field of jewelry appraisal later testified as to the value of the approximately fifty pieces of jewelry that had been seized from Mohammad's home (which was among the jewelry that was forfeited). Tr. 3482-3494. Although Mohammad does not challenge the testimony regarding the nature of the 1990 transaction, he contends that the district court erred when it allowed evidence regarding his forfeiture of assets and the value of the jewelry found in his home at the time of the 1990 offense. We review the district court's decision for abuse of discretion. E.g., United States v. Best, 250 F.3d 1084, 1090 (7th Cir.), cert. denied, 122 S. Ct. 279 (2001).

We find no abuse of discretion in the admission of this testimony. The district court found that the forfeiture evidence was admissible in part to demonstrate Mohammad's ability to engage in substantial drug transactions involving large amounts of money. R. 339. As the government's case against Mohammad here posited that he was supplying his co-conspirators with large sums of narcotics, we have no quarrel with the district court's assessment.

See, e.g., United States v. Denberg, 212 F.3d 987, 994 (7th Cir. 2000) (evidence of prior drug trafficking admissible to show, inter alia, defendant's ability to traffic in significant quantities of narcotics); United States v. Shields, 999 F.2d 1090, 1099 (7th Cir. 1993) (evidence of defendant's prior payments to judge relevant "because it demonstrated he had the ability, willingness, and chutzpah to bribe a judge"), cert. denied, 510 U.S. 1071, 114 S. Ct. 877 (1994); United States v. Chaverra-Cardona, 879 F.2d 1551, 1555 (7th Cir. 1989) (evidence of defendant's finances was probative of his resources and ability to carry out charged murder-for-hire schemes). The jury was properly instructed as to the limited purposes for which this evidence was offered, and given that the state police officer's testimony about the 1990 forfeiture occupied no more than one page among the several thousand pages of the trial transcript, see Tr. 2979, we discern the likelihood of undue prejudice to Mohammad as slight. Cf. United States v. Macias, 930 F.2d 567, 572 (7th Cir. 1991) (where Rule 404(b) testimony was "brief and noninflammatory in nature," risk of prejudice was minimized). As for the value of the jewelry seized in 1990, Mohammad's sole argument is that the value was irrelevant absent proof that he himself had purchased the jewelry. As the district court observed, however, it is at least a fair inference that Mohammad had purchased the jewelry given that it had been found in his possession. Tr. 3544.

N. Requested Recusal of District Judge

In advance of trial, Young filed a motion in which the other defendants subsequently joined asking the district judge to recuse himself pursuant to 18 U.S.C. Â§ 455 for two reasons: (1) the judge's daughter was dating an agent of the U.S. Drug Enforcement Administration ("DEA"); and (2) his daughter, as an employee of the Chicago Crime Commission, was writing a book about gangs and drugs. R. 285; see Tr. 742-1, 12/18/97 Tr. 8. The judge denied the motion, concluding that neither his daughter's relationship with the DEA agent nor her work for the Crime Commission reasonably called into question his ability to be impartial in this case. Id. at 9-10. The judge observed that he had met the DEA agent that his daughter was dating on three or four occasions, that the agent had no involvement with this case, that the DEA generally had nothing more than a tangential involvement with this case, and that the judge had not discussed the case with him. Id. at 11; R. 742-2, 1/5/98 Tr. 8, 10. As to his daughter's work, the judge noted that she had been employed with the Crime Commission for several years, that in the course of her employment she had written and edited a report entitled "The New Faces of Organized Crime," that she had not discussed the report with him, that he had read no more than the title page of the report, and that he had no idea whether the report discussed either the TVLs or any other group. R. 742-1, 12/18/97 Tr. 5, 1213; R. 742-

2, 1/5/98 Tr. 8-9. (The record indicates, in fact, that defense counsel obtained a copy of the report and that it did not mention the TVLs. See R. 742-2, 1/5/98 Tr. 7.) Neither Young nor any other defendant filed a petition for mandamus following the district court's ruling, an omission that forecloses appellate relief under section 455. See United States v. Smith, 210 F.3d 760, 764 (7th Cir. 2000).

Mohammad Mansoori nonetheless argues that the judge's refusal to recuse himself deprived him of his Fifth Amendment right to due process. Because he did not rely on the due process clause below, he forfeited this argument and our review is confined to one for plain error alone. See, e.g., United States v. Williams, supra, 272 F.3d at 854-55.

The district judge certainly committed no plain error in declining to recuse himself. As the government points out, the Constitution demands recusal in a narrower range of circumstances than does the statute.

Generally speaking, due process compels recusal only when "the [biasing] influence . . . is so strong that [the court] may presume actual bias." Del Vecchio v. Illinois Dep't of Corrections, 31 F.3d 1363, 1375 (7th Cir. 1994) (en banc), cert. denied, 514 U.S. 1037, 115 S. Ct. 1404 (1995).

Conflicts arising from the judge's familial relationships normally do not mandate recusal under the due process clause. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 820, 106 S. Ct. 1580, 1584 (1986).

Here, no basis has been shown for believing that the work and social life of the judge's daughter gave rise to a disqualifying bias on the part of the judge. Her report for the Chicago Crime Commission concerned neither the defendants, the Traveling Vice Lords, nor the facts of this case, and the judge himself had not even read the report. Likewise, the DEA agent whom she was dating had no involvement in this case, and the judge had not discussed the case with him.

O. Supervisory Enhancement for Cox

Pursuant to section 3B1.1(b) of the Sentencing Guidelines, the district court determined that Cox qualified as a "manager or supervisor" of criminal activity that "involved five or more participants or was otherwise extensive" and enhanced his offense level by three levels. R. 730, Cox Sentencing Tr. 26-29. The court had no doubt that the criminal activity at issue in this case involved at least five individuals or was otherwise extensive: the conspiracy had a broad temporal and geographic reach and was responsible for numerous narcotics transactions that took place on a daily basis. Id. at 27. As for Cox's role in that conspiracy, the court noted that Cox had told Cronin upon his arrest that he controlled the distribution of narcotics within an eight or nine square-block portion of the TVL domain and that he could "shut down" other TVL members who were selling drugs within that area. Id. at 27-29. The court noted further that Cox's management of at

least one "drug spot" required him to employ several individuals who could sell drugs, transport money and drugs, and secure the "spot." Id. at 29. These facts, the district court reasoned, supported the inference that Cox had managed or supervised one or more participants in the charged conspiracy. Id. at 27, 29.

The court did not name any such participant, however, see id. at 29, and this forms the basis for Cox's objection to the managerial enhancement. Unless the district court can identify by name at least one person whom the defendant supervised or managed, Cox argues, it cannot impose the enhancement. See United States v. Stubbs, 11 F.3d 632, 641 (6th Cir. 1993) (holding that section 3B1.1 requires the district court to "make specific findings as to the identity of the persons involved in the criminal enterprise"); but see also United States v. Fells, 920 F.2d 1179, 1182 (4th Cir. 1990) (lower-level distributors with whom defendant supplied crack cocaine were properly considered by district court in imposing section 3B1.1 enhancement although not identified by name), cert. denied, 501 U.S. 1219, 111 S. Ct. 2831 (1991); United States v. McDowell, 918 F.2d 1004, 1011 (1st Cir. 1990) (identities of participants in crime need not be proved expressly for purposes of section 3B1.1, although district court must make finding that "pinpoints them with enough particularity to give credence to the upward adjustment"); United States v.

Barbontin, 907 F.2d 1494, 1498 (5th Cir. 1990) (identities of participants need not be proved expressly for purposes of section 3B1.1).

This argument poses a legal issue as to which our review is de novo. See United States v. Tai, 41 F.3d 1170, 1174 (7th Cir. 1994).

We do not agree that a court must invariably identify by name the person or persons whom the defendant managed or supervised, however. Our opinion in United States v. Schweihs, 971 F.2d 1302, 1318 (7th Cir. 1992), does indicate that the district court must identify each of the participants in the criminal enterprise when imposing a section 3B1.1 enhancement. In the absence of such a finding, we cannot exercise meaningful review of the court's threshold determination that there were at least five criminally culpable participants in the offense or its ultimate determination that the defendant managed or supervised one or more of these participants. United States v. Jewel, 947 F.2d 224, 235-36 (7th Cir. 1991); see also McDowell, 918 F.2d at 1011-12. Yet, in some cases, the evidence may leave no doubt that the defendant directed another culpable participant but may not reveal that person's name. In United States v. Richards, 198 F.3d 1029, 1031 (7th Cir. 2000), for example, an unnamed individual had met the defendant and escorted him and his confederates in narcotics trafficking to a "safe house"; and another such unnamed individual had retrieved his minivan and

later returned it to him loaded with marijuana. We indicated that the district court could properly consider those individuals as participants in the criminal enterprise over whom the defendant had exercised control, notwithstanding the absence of evidence as to their names. Id. at 1034. See also United States v. Cadavid, 192 F.3d 230, 237 (1st Cir. 1999) (evidence that conspiracy involved four named individuals and two unnamed individuals sufficient to support district court's determination that the enterprise involved five or more participants); Fells, 920 F.2d at 1182-83 (evidence that defendant's narcotics distribution network involved four named participants and seventeen unnamed, lower-level distributors was sufficient to support district court's finding that the enterprise involved five or more participants). So long as the court's findings and the underlying evidence make clear that the criminal enterprise involved at least five culpable participants and that the defendant actually did manage or supervise one or more of these individuals, the lack of evidence as to the name of the person that the defendant supervised or managed should not foreclose imposition of the managerial enhancement pursuant to section 3B1.1(b). In this case, the district court pointed to specific evidence indicating that Cox had managed or supervised other criminally culpable participants in the TVL's narcotics operations. But for the fact that the evidence does not reflect the names of these individuals, Cox makes no challenge

to the sufficiency of this evidence or the district court's findings. We find no error in the district court's decision.

P. Choice's Offense Level

The district court made several factual determinations that increased Choice's offense level and, ultimately, mandated a prison term of life. First, in establishing Choice's base offense level, the court determined that Choice should be held to account for the full amount of cocaine distributed by the members of the conspiracy--more than 150 kilograms--in view of Choice's "full participation in the conspiracy." R. 748, Choice Sentencing Tr. 18; see also id. at 16-18, 19-20. Second, although the evidence did not indicate that Choice himself had possessed a firearm in connection with the conspiracy, the court increased Choice's base offense level by two levels based on the fact that his co-conspirators had done so. Id. at 18-19, 20; see U.S.S.G. § 2D1.1(b)(1).

Finally, as with Cox, the court increased Choice's offense level by another three levels based on Choice's exercise of managerial or supervisory authority over certain aspects of the conspiracy, including the distribution of heroin at the Henry Horner Homes, a public housing project on Chicago's west side. R. 748, Choice Sentencing Tr. 20; see U.S.S.G. § 3B1.1(b). Choice challenges each of these findings, which we review for clear error. E.g., United States v. Kroledge, 201 F.3d 900, 905

(7th Cir. 2000). None of these three factual determinations was clearly erroneous.

For purposes of establishing the defendant's offense level, the relevant drug quantity need not be proven beyond a reasonable doubt, as Choice contends, so long as the resulting sentence is within the range of penalties proscribed in the statute. E.g., United States v. Hernandez, 226 F.3d 839, 841-42 (7th Cir. 2000). In this case, the statute specified a prison term of twenty years to life so long as the offense involved at least five kilograms of cocaine and/or one kilogram of heroin. 21 U.S.C. § 841(b)(1)(A)(i, ii). The jury was not asked to find beyond a reasonable doubt whether the conspiracy involved at least this much cocaine, and as we have discussed, that constituted an error under Apprendi. See supra at 29-30. But we have already held this error not to constitute plain error in view of the overwhelming evidence that the conspiracy involved far more than the threshold quantities of five kilograms of cocaine and one kilogram of heroin. See supra at 30-31. For purposes of determining where within the statutory range of twenty years to life Choice was to be sentenced, the district court was free to establish the relevant drug quantity based on a preponderance of evidence. E.g., United States v. Nubour, 274 F.3d 435, 444 (7th Cir. 2001), petition for cert. filed, No. 01-10947 (U.S. June 20, 2002). Choice does not dispute that the district

court's 150-kilogram finding has adequate evidentiary support under this burden.

Although Choice secondarily contends that the court erred in holding him responsible for the full amount of cocaine involved in the conspiracy, we find no clear error in that determination. See, e.g., United States v. GutierrezHerrera, 293 F.3d 373, 376 (7th Cir. 2002). A defendant may be held to account for the full quantity of drugs involved in a conspiracy to distribute narcotics so long as that amount was reasonably foreseeable to him. U.S.S.G. § 1B1.3(a) (1)(B) & comment.(n.2); see, e.g., United States v. Robbins, 197 F.3d 829, 850-51 (7th Cir. 1999); United States v. Flores, 5 F.3d 1070, 1082-83 (7th Cir. 1993), cert. denied, 510 U.S. 1074, 114 S. Ct. 884 (1994). Notwithstanding his protestations of "minimal" involvement in the conspiracy, the evidence revealed that Choice was Young's "right-hand man" and that he enjoyed a position of significant status and authority within the TVL hierarchy as a result. See, e.g., Tr. 346, 668, 673, 1228, 1252, 1751-52. The evidence also reveals Choice's personal involvement in a number of multikilogram transactions. To cite just a few examples, the evidence indicated that Choice had picked up a ten-kilogram quantity of cocaine from Young on at least one occasion, Tr. 694, that he had delivered cocaine to Leslie Teague on more than ten occasions for Young, Tr. 2096-99, 2105-07, that he had managed the distribution of heroin at the Henry

Horner Homes and had picked up heroin from Young for that purpose, Tr. 342-43, 358, and that he was distributing three kilograms of cocaine per week at one point in time, Tr. 1049. The district court was entitled to infer that someone with Choice's degree of involvement could have reasonably foreseen that the conspiracy involved at least 150 kilograms of cocaine (or its equivalent).

For the same reason, we find no error in the district court's decision to apply the firearms enhancement. A defendant convicted of conspiracy need not have possessed a firearm himself for the enhancement to apply, so long as his co-conspirators' possession of firearms in furtherance of the conspiracy was reasonably foreseeable to him. See, e.g., United States v. Cavender, 228 F.3d 792, 801 (7th Cir. 2000), cert. denied, 532 U.S. 1023, 121 S. Ct. 1965 (2001). Firearms were widely used in the TVLs' trafficking operations, see Tr. 702, 723-26, 1452-53, 1857-60, and given the extent of Choice's hands-on involvement in those operations, he must have been aware of the presence and use of firarms.

Nor, finally, do we discern any error in the imposition of the managerial enhancement. The evidence revealed not only that Choice ran the heroin distribution at the Henry Horner Homes, see Tr. 342-49, 668, which required that he supervise more than one other criminally responsible person, but also that he directly supervised Terry Bronson (nicknamed

"Frog"), who helped him pick up and deliver drugs, Tr. 342-43, 350, 353.

Q. Enhancement of Bahman Mansoori's Offense Level for Obstruction of Justice

Based on Bahman Mansoori's refusal to comply with a court order directing him to supply a voice exemplar, the court enhanced his offense level for obstruction of justice. See U.S.S.G. § 3C1.1. Not long before the government rested its case-in-chief, Bahman's counsel informed the prosecution that he intended to call an FBI agent to the stand to testify about the government's use of voice exemplars in another case as a means of voice identification. The aim of this testimony, apparently, was to suggest that the FBI's language specialist, Behrooz Sarshar, lacked an adequate basis upon which to identify Bahman's voice on the tape recordings (see supra at 43-44) because the government had not used voice exemplars for that purpose.

After the defense case had begun and before the agent testified, the government sought to bar this line of inquiry and argument. After the district court overruled the government's objection, Tr. 3941, the government asked the court to order Bahman to provide a voice exemplar, Tr. 3942-45. Bahman objected to the request, and although the court did not definitively rule on the objection at that time, it did point out to Bahman's counsel that "[y]ou are the one that just brought this issue up." Tr. 3945. Later, after the agent testified, the court ordered

Bahman to provide an exemplar. Tr. 4015-16, 4387. When Bahman refused, the court permitted the government to elicit evidence of his refusal to the jury. Tr. 4514-15, 4520-21; see Tr. 4687-89. The court observed that Bahman had "opened the door" on this subject and that the court had allowed the agent's testimony on the condition that Bahman would supply the government with an exemplar. Tr. 4520. At sentencing, the court determined that an enhancement for obstruction of justice was appropriate in light of Bahman's refusal to comply with the court's order. R. 601, B. Mansoori Sentencing Tr.17-18. We review that determination for clear error. E.g., United States v. Yusufu, 63 F.3d 505, 514 (7th Cir.), cert. denied, 516 U.S. 1015, 116 S. Ct. 578 (1995).

The district court did not clearly error in imposing the obstruction enhancement. We have previously upheld such an enhancement based on the defendant's refusal to provide a handwriting exemplar. United States v. Ruth, 65 F.3d 599, 608 (7th Cir. 1995), cert. denied, 517 U.S. 1158, 116 S. Ct. 1548 (1996). Bahman's objection is premised on the notion that the government deprived him of due process by waiting until he had already commenced his defense to make its request for a voice exemplar--thus putting him to an untenable choice between submitting a potentially incriminating exemplar or making himself subject to a sentence increase for

obstruction of justice by refusing to submit the exemplar. Bahman Mansoori Suppl. Br. at 9-11.

But the record does not bear out Bahman's argument. The government requested the exemplar only after the court overruled its objection to the FBI agent's testimony, but also before Bahman put the FBI agent on the witness stand. Moreover, although the district court may not yet have definitively said that it would order the exemplar, it had expressed the view that Bahman was opening the door to that request by putting on testimony that called into question the reliability of the voice identifications. Tr. 3943, 3945, 4226; see also Tr. 4015-16. In short, before he called the FBI agent to testify about the use of voice exemplars in another case, Bahman knew that it was altogether possible the court would order him to submit an exemplar of his own. In no sense was he "set up" by the government or by the district court. The district court acted within its discretion in ordering him to submit the exemplar, see, e.g., United States v. Rogers, 475 F.2d 821, 825-26 (7th Cir. 1973), and given Bahman's refusal to comply with that order, the court committed no clear error in enhancing his offense level for obstruction of justice, Ruth, 65 F.3d at 608.

R. Denial of Young's Request for Downward Departure Without Evidentiary Hearing

Prior to sentencing, Young filed a motion asking the court to depart downward from the otherwise applicable sentencing range on three grounds: (1) his di-

minished mental capacity, see U.S.S.G. § 5K2.13, (2) his mental condition, see id. § 5H1.3, and (3) his prior good works, see id. § 5H1.11. The district court determined that Young was ineligible for a departure on the basis of diminished mental capacity because he had not been convicted of a nonviolent offense, as section 5K2.13 requires. United States v. Young, 1999 WL 731790, at *1-*3 (N.D. Ill. Aug. 31, 1999). This was a legal determination that we review de novo. United States v. Poff, 926 F.2d 588, 590-91 (7th Cir.) (en banc), cert. denied, 502 U.S. 827, 112 S. Ct. 96 (1991). With respect to his mental condition, the court indicated that Young had not articulated exceptional circumstances that might warrant a departure. Accordingly, the court summarily denied his request without holding an evidentiary hearing. 1999 WL 731790, at *3-*4. We review the district court's decision not to hold an evidentiary hearing for abuse of discretion. See Fed. R. Crim. P. 32(c)(1); United States v. Beltran, 109 F.3d 365, 369 (7th Cir.), cert. denied, 522 U.S. 852, 118 S. Ct. 145 (1997). Finally, the court denied Young's request for a departure on the basis of his good works on the merits, after hearing testimony regarding those works. R. 745-3, Young Sentencing Tr. 39-42. Of course, we lack jurisdiction to review a district court's discretionary decision not to depart downward, e.g., United States v. Schuh, 289 F.3d 968, 974 (7th Cir.

2002), and indeed, Young does not challenge that decision.

We turn to the requested diminished capacity departure first. The district court sentenced Young using the 1997 version of the Sentencing Guidelines. See Young, 1999 WL 731790, at *1. As of 1997, section 5K2.13 provided as follows:

If the defendant committed a non-violent offense while suffering from significantly reduced mental capacity not resulting from voluntary use of drugs or other intoxicants, a lower sentence may be warranted to reflect the extent to which reduced mental capacity contributed to the commission of the offense, provided that the defendant's criminal history does not indicate a need for incarceration to protect the public. U.S.S.G. § 5K2.13 (1997) (emphasis supplied).

The Guideline offered no guidance as to what constitutes a "violent" as opposed to a "non-violent" offense. In Poff, 926 F.2d 588, we held by a divided (6 to 5) vote that this determination must be made with reference to the definition of "crime of violence" set forth in the career offender guideline, section 4B1.2(a). *fn12 That guideline, which tracks the language of the Armed Career Criminal Act, 18 U.S.C. § 924(e), provides:

The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that-

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

We reasoned in Poff that the terms "crime of violence" and "non-violent offense" are mutually exclusive, such that any offense that amounts to a "crime of violence" under the criteria set out in section 4B1.2(a) cannot be a "non-violent offense" for purposes of section 5K2.13. 926 F.3d at 591-93; cf. id. at 594-95 (Easterbrook, J., dissenting). Under Poff, then, a conviction for any crime that (i) is defined in such a way as to include the actual, attempted, or threatened use of force, or (ii) constitutes burglary of a dwelling, arson, or extortion, or involves the use of explosives, or (iii) "presents a serious potential risk of physical injury to another," will preclude a departure for diminished mental capacity. This is a categorical approach that abjures any inquiry into whether the defendant actually engaged in violence in committing the offense and focuses instead on the nature of the offense. Compare id. at 593 (majority) with id. at 594-95 (dissent); see United States v. Sullivan, 75 F.3d 297, 300 & n.1 (7th Cir. 1996); see also United States v. Dailey, 24 F.3d 1323, 1325-27 (11th Cir. 1994); United States v. Mayotte, 76 F.3d 887, 889 (8th Cir. 1996); United States v. Borrayo, 898 F.2d 91, 94

(9th Cir. 1989); United States v. Maddalena, 893 F.2d 815, 819 (6th Cir. 1989), cert. denied, 502 U.S. 882, 112 S. Ct. 233 (1991); contra United States v. Weddle, 30 F.3d 532, 540 (4th Cir. 1994) (conviction for offense that meets section 4B1.2's criteria for "crime of violence" may nonetheless qualify as "non-violent offense" for purposes of section 5K2.13); United States v. Chatman, 986 F.2d 1446, 1450 (D.C. Cir. 1993) (same)*fn13

The offenses of which Young was convicted--narcotics conspiracy, possession of cocaine with the intent to distribute, and money laundering--do not have elements involving the actual, attempted, or threatened use of force, see section 4B1.2(a)(1), nor do they fall into one of the categories of offenses expressly identified as violent in section 4B1.2(a)(2) (burglary of a dwelling, arson, etc.). Therefore, only if these offenses may be said to "involve[ ] conduct that presents a serious potential risk of physical injury to another" may they be labeled violent crimes that preclude a downward departure under section 5K2.13.

Notably, the career offender guideline does not permit a free-ranging exploration of the facts underlying and surrounding a defendant's conviction in order to make this determination. The commentary instead explains that "the offense of conviction (i.e., the conduct of which the defendant was convicted) is the focus of inquiry," U.S.S.G. § 4B1.2, comment. (n.2), and it specifically directs the sentencing

court to examine "the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted" and consider whether that conduct, "by its nature" posed a serious risk of injury, id. (n.1). See United States v. Shannon, 110 F.3d 382, 384 (7th Cir.) (en banc), cert. denied, 522 U.S. 888, 118 S. Ct. 223 (1997); United States v. Hoults, 240 F.3d 647, 650-52 (7th Cir. 2001); United States v. Lee, 22 F.3d 736, 738-40 (7th Cir. 1994); see also Taylor v. United States, 495 U.S. 575, 600-02, 110 S. Ct. 2143, 2159-60 (1990) (construing comparable language in Armed Career Criminal Act, 18 U.S.C. § 924(e)).

Looking to the language of the indictment in this case, Judge Lindberg concluded that the narcotics charges against Young presented a serious risk of potential injury to others, thus foreclosing the possibility of a downward departure for diminished mental capacity. Count One of the superseding indictment, which set forth the narcotics conspiracy charge against Young and his co-defendants, specifically alleged:

It was further part of the conspiracy that defendants Terry Young [and others] . . . assisted each other in the distribution of narcotics by using street gang affiliation, violence, and the threat of violence to minimize competition in and otherwise maintain control over these geographic areas, and on occasion by assisting each other in stealing narcotics

from other narcotics distributors. 1999 WL 731790, at *2, quoting R. 133 at 3 ¶ 4.

Judge Lindberg found this allegation sufficient to establish that Young's convictions were for "crimes of violence" as section 4B1.2(a)(2) defines such offenses. Id. He observed:

Drug dealing, especially at the scale involved here, is far from a benign activity. Squabbles over turf and stealing from other drug distributors are quite common and are, inter alia, a rich source of violence. Trial testimony amply demonstrated that defendant's drug operation was no exception. . . . Id.

Young argued below, and renews the argument here, that although the sentencing court may look to the language of the indictment to determine whether a particular offense amounted to a violent crime, it must confine its consideration to those allegations that were necessary to charge the offense of conviction. The mere fact that violent acts were alleged in the indictment is not enough, in Young's view, to confirm that the defendant was convicted of a violent offense; only if such facts were essential to the conviction may the sentencing judge consider them.

Young's argument has the support of a number of career offender cases, which indeed emphasize that when review of the charging document is necessary in order to assess the nature of a defendant's prior conviction, the court should focus solely on allegations that were essential to the conviction. See, e.g., United States v. Jackson, 177 F.3d 628, 632 (7th

Cir. 1999) ("By considering only the minimum facts necessary to support Jackson's conviction, we can ensure that we impose a sentence enhancement only for conduct of which Jackson was actually convicted."); see also United States v. Winter, 22 F.3d 15, 19 (1st Cir. 1994) (when examining charge underlying prior conviction,"the court should not plunge into the details of a particular defendant's conduct but, rather, . . . should merely assess the nature and object of the [charged offense] as described in the indictment and fleshed out in the jury instructions").

These cases suggest that an indictment's allegations of violence are relevant for purposes of the career offender guideline only if those allegations go to the heart of the charged offense. With respect to a conspiracy conviction, for example, an allegation that the defendant conspired to commit murder obviously would be relevant in the sense that it revealed the very object of the conspiracy; and one could confidently read into the conviction a finding that the defendant had conspired to commit a violent act. See United States v. Fiore, 983 F.2d 1, 3 (1st Cir. 1992), cert. denied, 507 U.S. 1024, 113 S. Ct. 1830 (1993). Likewise, with respect to a racketeering conviction, an allegation that the defendant engaged in predicate acts of extortion and arson would be probative of the nature of the racketeering; and once again, the conviction on an indictment containing that allegation would stand as proof that

the defendant had engaged in violent conduct. See Winter, 22 F.3d at 19-20. By contrast, in a check-kiting case, an allegation that the defendant engaged in a violent act would be entirely beside the point, as the use of violence has nothing whatever to do with the elements of check kiting, and conviction on the charge would in no way depend upon proof of violence nor reflect a finding that such violence had occurred. See id. at 19-20, 20-21; but see Shannon, 110 F.3d at 387 ("it is common ground between the parties that in deciding just what the defendant's offense was we are free to look at the facts charged in the indictment or information; we are not confined to the minimum conduct that would create the offense").

Thus, the fact that the indictment in this case alleged the use of violence and threats of violence does not necessarily establish that any of the charges on which the jury convicted Young were crimes of violence.

An indictment may allege any number of facts which, although illuminating in a contextual sense, are by no means necessary to establish that the defendant committed the crime charged. See United States v. Ewings, 936 F.2d 903, 905-06 (7th Cir. 1991) (merely because extraneous facts are alleged in indictment does not render proof of those facts relevant and admissible at trial).

The alleged acts of violence on which the district court relied here appear to fall into that category of

collateral facts. Proof that violence was used or threatened was wholly unnecessary to establish that Young conspired to distribute narcotics, or for that matter, that he possessed narcotics with the intent to distribute and laundered money. The violence allegation speaks neither to the central object nor the essential nature of the charged crimes. Moreover, as the jury instructions reveal, the jury was not directed that Young's guilt on the narcotics or money-laundering charges in any way depended on a finding that he or his co-defendants had engaged in violent acts. See Tr. 5330-33 (conspiracy), 5333-35 (distribution of a controlled substance), 5337-40 (money laundering). Consequently, although the indictment alleged that the charged offenses involved violence or the threat of violence, one cannot read into Young's convictions on these charges a finding that he engaged in violent conduct. See Jackson, 177 F.3d at 632. Therefore, pursuant to the categorical assessment of the defendant's convictions that Poff requires, none of Young's convictions can be considered crimes of violence that precluded the district court from entertaining a departure under section 5K2.13.

We must, therefore, remand so that Judge Lindberg may consider anew whether Young's allegedly diminished mental capacity calls for a downward departure. See, e.g., United States v. Jaroszenko, 92 F.3d 486, 491 (7th Cir. 1996). We hasten to add that the judge is by no means pre-

cluded from considering the extent to which Young and his co-conspirators employed violence in furtherance of their crimes—along with any other pertinent factors--in making that determination. (The guideline itself indicates that a departure may not be granted to the extent that the defendant's criminal history reveals a need for incarceration to protect the public, for example.) We have concluded only that Young's convictions for conspiring to distribute narcotics, distributing a controlled substance, and money laundering do not constitute violent offenses that categorically disqualify Young for a departure under section 5K2.13. As it otherwise considers the propriety of a departure, however, the court need not blind itself to the circumstances underlying his offenses. Cf. United States v. Purchess, 107 F.3d 1261, 1271-72 (7th Cir. 1997) (court may depart upward on the basis of relevant conduct).

With respect to Young's request for a downward departure based on his mental condition, see § 5H1.3, which is a disfavored ground for departure, we conclude that the district judge did not abuse his discretion in denying the request without conducting an evidentiary hearing. The Sentencing Guidelines do not invariably obligate the court to conduct an evidentiary hearing to resolve a contested issue, so long as the sentencing court gives both parties the opportunity to present the information that it needs to decide the matter. U.S.S.G. § 6A1.3(a); e.g., United States v. Beltran, supra, 109 F.3d at

369; see also Sentencing Guidelines, 88 GEO. L.J. 1483, 1519 n.2052 (2000) (collecting cases).

Here, the papers that Young submitted to the court in support of his departure requests were sufficient to apprise the court of his mental condition. In denying the request, Judge Lindberg did not question the veracity of Young's representations; he simply found them insufficient to warrant a departure from the guideline sentencing range. See 1999 WL 731790, at *4. Under these circumstances, the judge was not obligated to conduct an evidentiary hearing.

S. Community Restitution

In controlled substance prosecutions such as this one, in which there is no identifiable victim of the offense, 18 U.S.C. § 3663(c) permits the sentencing judge to order the payment of restitution commensurate with the public harm caused by the crime. However, section 3663(c)(2)(B) further provides that the amount of restitution ordered in such a case shall not exceed the amount of the fine imposed for the offense. The district court ordered both Young and Cox to pay community restitution. See R. 730, Cox Sentencing Tr. 31-32, and R. 682; R. 745-3, Young Sentencing Tr. 47, and R. 681. However, because the court did not order either of them to pay a fine, they contend that the restitution order was plainly erroneous. The government concedes the error, and in view of the unequivocal terms of section 3663(c) (2)(B), we agree that the restitution

obligations imposed on Young and Cox were plainly erroneous.

It appears that the court made the same error with respect to the other defendants as well. See R. 748, Choice Sentencing Tr. 21-22, and R. 691; R. 601, B. Mansoori Sentencing Tr. 51, and R. 569; R. 690 (M. Mansoori).

We therefore vacate and remand the sentences of all defendants for correction of that error.

III.

For all of the foregoing reasons, we AFFIRM the defendants' convictions but VACATE their sentences and REMAND for re-sentencing in accordance with this opinion.

Opinion Footnotes

*fn1 During minimization periods, the monitoring agent would stop recording the conversation and turn the sound off in the interception device.

*fn2 These subtotals do not include certain intercepted communications, including calls that were placed to pagers, calls in which the intended recipient was not reached, and conversations that took place in Farsi.

*fn3 The instructions authorized agents to listen to a conversation for a period longer than two minutes if the nature of the conversation was not entirely clear but was possibly related to the subject of the investigation. See R. 267 Ex. A at 5.

*fn4 The instructions did indicate that if conversations between the subject and one or more other in-

dividuals were invariably innocent, then subsequent conversations involving those conversations should no longer be monitored or recorded even on a spot basis. See R. 267 Ex. A at 6 ¶ 10.

*fn5 In support of its request for an anonymous jury, the government asserted that Young previously had "cloned" a pager belonging to a Chicago gang crimes specialist in an effort to determine whether the officer was investigating him and to ascertain the identities of the officer's informants. App. 266. Judge Lindberg never relied upon this allegation as the basis for an anonymous jury.

*fn6 Paragraph 10(j) of the questionnaire to which each of the prospective jurors was asked to respond under oath contained the following admonition: Under the American system of justice every defendant is presumed innocent throughout the trial. Moreover, defendants are not required to prove anything and are entitled to put the government to its proof. Every defendant has an absolute right not to testify and the exercise of this right cannot be held against a defendant. R. 350 at 5 ¶ 10; R. 351 at 5 ¶ 10; R. 352 at 5 Â¶ 10 (emphasis in original).

*fn7 "A drug spot will be a certain area, usually a street corner, in the middle of the block, where [gang members involved in narcotics trafficking] control the street operation, where--where individual packets [of drugs] are sold." Tr. 1574.

*fn8 The district court sentenced Bahman Mansoori to a term of 170 months, which is of course below

the default maximum of twenty years. Accordingly, his sentence is unaffected by Apprendi.

*fn9 Carter, however, after pleading guilty and co-operating with the government, was sentenced on a cocaine quantity of only 50 to 150 kilograms. See Tr. 1123-24.

*fn10 As Cox points out, the district court did not hold an evidentiary hearing in order to explore the circumstances surrounding his arrest and detention, the interrogations by Cronin and Grapenthein, and, in particular, the reasons for the delay in bringing Cox before a judicial officer. Still, Cox has not challenged the reasons that the government has articulated for the delay in his arraignment, nor has he alleged that there are facts other than the delay (e.g., coercive interview tactics) which bear on the admissibility of his confession. Consequently, we have no reason to question the district court's finding that the delay was not motivated by a desire to extract a confession from Cox.

*fn11 It is not entirely clear from the trial transcript that Young articulated the particular Bruton theory that he pursues now at the time he moved for a mistrial in the district court. See Tr. 1455. But the government has elected to address the merits of his current Bruton theory rather than contend that he forfeited that theory by failing to argue it below. The government has therefore waived any contention based on forfeiture or waiver. See, e.g., United

States v. Buchmeier, 255 F.3d 415, 419 (7th Cir.), cert. denied, 122 S. Ct. 505 (2001).

*fn12 The career offender guideline, section 4B1.1, mandates a prison term at or near the statutory maximum for adults who stand convicted of "a felony that is either a crime of violence or a controlled substance offense" and whose criminal history includes at least two prior felony convictions for the same types of crimes. Section 4B1.2(a) in turn defines "crime of violence" as that term is used in section 4B1.1.

*fn13 Effective November 1, 1998, the Sentencing Commission amended section 5K2.13 in order to make clear that the sentencing judge is to examine the circumstances underlying the defendant's offense in order to decide whether he qualifies for a diminished capacity reduction rather than make a categorical determination whether the offense was "violent" or "nonviolent". See U.S.S.G. App. C., amend. 583. The amended guideline now permits a downward departure unless: (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; or (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public. U.S.S.G. § 5K2.13 (Nov. 1998) (empha-

sis added). In explaining the revision, the Commission noted the division among the circuits as to the appropriate means of deciding whether the defendant's offense was "nonviolent" and remarked that "[t]he amendment replaces the current policy statement with a new provision that essentially represents a compromise approach to the circuit conflict." U.S.S.G. App. C, amend 583, comment. Although the revised version of section 5K2.13 took effect well in advance of Young's sentencing, the parties agreed the 1997 version of the Guidelines should be used to sentence Young as the November 1998 version was less favorable to him and consequently created the potential for a violation of his rights under the ex post facto clause of the Constitution. See U.S.S.G. § 1B1.11(b)(1); United States v. Schaefer, 291 F.3d 932, 936 n.1 (7th Cir. 2002); United States v. Kosmel, 272 F.3d 501, 507 (7th Cir. 2001). Judge Lindberg therefore applied the 1997 version of section 5K2.13. See Young, 1999 WL 731790, at *1. Neither Young nor the government suggests on appeal that we should apply the revised version of the Guideline. Accordingly, we need not decide whether the Commission's revision was "clarifying" (in which case it would apply to pending cases) or "substantive" (in which case it would not apply). See U.S.S.G. § 1B1.11(b)(2) (court should consider guideline amendments made subsequent to defendant's offense "to the extent that

such amendments are clarifying rather than substantive changes"); see also, e.g., United States v. Hartz, 296 F.3d 595, 598-99 (7th Cir. 2002); United States v. Minneman, 143 F.3d 274, 282 (7th Cir. 1998), cert. denied, 526 U.S. 1006, 119 S. Ct. 1145 (1999); compare United States v. Askari, 159 F.3d 774, 779-80 (3rd Cir. 1998) (en banc) (relying on the parties' agreement that the revision to section 5K2.13 was clarifying), with United States v. Allen, 181 F.3d 104 (6th Cir. 1999) (unpublished), text in Westlaw, 1999 WL 282674, at *2 (holding that the revision to section 5K2.13 was substantive).

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Young II:
United States v. Mansoori, No. 04-1950 (7th Cir. 03/13/2007)
In the United States Court of Appeals For the Seventh Circuit
Nos. 04-1950, 04-1974, 04-2653 & 05-3440
March 13, 2007
UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,
v.
MOHAMMAD MANSOORI, MARK COX, KENNETH CHOICE, AND TERRY YOUNG,
DEFENDANTS-APPELLANTS.
Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 97 CR 63. George W. Lindberg, Judge.The opinion of the court was delivered by: Rovner, Circuit Judge

SUBMITTED JULY 10, 2006*fn1
Before BAUER, MANION, and ROVNER, Circuit Judges.

In 2002, we affirmed the convictions of defendants-appellants Mohammad Mansoori, Mark Cox, Kenneth Choice, and Terry Young (collectively, the "defendants") in this narcotics conspiracy case, but we vacated their sentences and remanded the case to the district court in order to correct certain sentencing errors we had identified. United States v. Mansoori, 304 F.3d 635 (7th Cir. 2002) ("Mansoori I"). On
remand, the district court corrected those errors but left in place the life sentences that all of the defendants had originally received on their conspiracy convictions.

The defendants' current appeals are aimed at their life sentences. Mansoori, Cox, and Choice contend that because we vacated their sentences in Mansoori I, they were (and are) entitled to de novo re-sentencing rather than re-sentencing confined to the particular errors we found in the prior appeal. De novo re-sentencing likely would benefit the defendants, because if the district court were to start the sentencing process over from scratch, it would have to comply with the Supreme Court's decision in

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348 (2000). In Mansoori I, we determined that the imposition of life sentences on the defendants' conspiracy convictions amounted to Apprendi error, because the jury had not made a finding as to the amount of narcotics involved in the conspiracy that would authorize a prison term of life. 304 F.3d at 657. However, believing that none of the defendants had made an Apprendi-like argument below, we reviewed the Apprendi challenge for plain error only. Id. We concluded that the Apprendi error did not warrant relief under that stadard, reasoning that a properly instructed jury
surely would have found the drug quantity necessary to support the life sentences. Id. at 658. Consequently, we did not find the defendants entitled to re-sentencing on their convictions for narcotics conspiracy. If, however, the defendants were now to be re-sentenced de novo, as if the
original sentencing had never occurred, the district court would be bound by Apprendi, and in the absence of a jury finding as to the relevant drug quantity, the lengthiest prison term that the court could impose on the conspiracy charge would be twenty years. See Mansoori I, 304 F.3d at 659 (discussing the erroneous life sentences imposed as to Young and Choice on the distribution charge set forth in Count Two); 21 U.S.C. § 841(b)(1)(C).

Alternatively, Mansoori, Cox, and Choice contend that their sentences are inconsistent with the

Supreme Court's decision in United States v. Booker, 543 U.S. 220, 125 S.Ct. 738 (2005), because the district court treated the Sentencing Guidelines as binding when it re-sentenced them. They ask us to grant them limited remands under United States v. Paladino, 401 F.3d 471 (7th Cir.), cert. denied, 126 S.Ct. 106 (2005), and cert. denied, 126 S.Ct. 1343 (2006), so that the district court may consider whether it would have imposed the same sentences on them knowing that the Guidelines are no longer binding but merely advisory.

Like his co-defendants, Young attacks his life sentence on the basis of Apprendi, but his reasoning is different. Young contends that because he, in contrast to the other defendants, preserved an Apprendi argument at his original sentencing, we erred in subjecting his Apprendi challenge to limited, plain error review. Young urges us to correct the mistake, vacate his life sentence on the conspiracy charge, and remand for de novo re-sentencing subject to a maximum prison term of twenty years on that charge.

For the reasons that follow, we conclude that Mansoori, Cox, and Choice are not entitled to de novo re-sentencing. They are, however, entitled to Paladino remands. We further conclude that Young is not entitled to de novo re-sentencing either, notwithstanding his contention that he preserved his Apprendi challenge. Assuming that he timely raised

an Apprendi argument in the district court, the error was harmless for the same essential reason we found it not to constitute plain error in Mansoori I. A Paladino remand is unnecessary in Young's case, as the district court stated on the record that it would not sentence Young any differently treating the Sentencing Guidelines as advisory in accord with Booker.

I.

A jury convicted all four defendants of conspiring to distribute narcotics, in violation of 21 U.S.C. § 846, and the district court ordered them to serve life terms for that offense. In addition, Young and Choice were convicted of possessing cocaine with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and were ordered to serve concurrent life terms on that charge; Young was convicted of one count of money laundering, in violation of 18 U.S.C. § 1956, and was ordered to serve a concurrent term of twenty years on that charge; and Mansoori was convicted of 11 counts of engaging in monetary transactions involving property derived from criminal activity, in violation of 18 U.S.C. Â§ 1957, as to which the district court imposed consecutive terms of ten years, to be
served concurrently with his life term on the conspiracy charge.

On appeal, we affirmed the defendants' convictions but concluded that resentencing was necessary in order to correct certain errors. Specifically, we

concluded that Young and Choice were subject to a maximum prison term of 20 years rather than life on the distribution charge, 304 F.3d at 658-59; that Young and Mansoori were subject to special assessments of $50 rather than $100 on their convictions for monetary offenses, id. at 659; that as to Young, the district court had the authority to consider a downward departure based on his purportedly diminished mental capacity, id. at 672-676; and that the district court
erred in ordering the defendants to pay community restitution, id. at 677.

As we have mentioned, among the arguments on which we did not grant relief in Mansoori I was the defendants' joint argument that their life sentences on the conspiracy charge were imposed in violation of their Sixth Amendment right to a jury trial as explained in Apprendi. Believing that none of the defendants had raised this issue in the district court,
we reviewed the Apprendi argument for plain error only. Id. at 657. We agreed that the imposition of a life term constituted an obvious error in retrospect. The statute under which the defendants were charged with conspiracy provides for a prison sentence of up to life so long as the offense involved five or more kilograms of cocaine or one or more
kilograms of heroin. 21 U.S.C. § 841(b)(1)(A)(i) and (ii). However, in the
absence of a proven drug amount, the default maximum prison term is twenty years. §

841(b)(1)(C). In this case, the conspiracy charge set forth in Count One of the indictment did not allege, and the jury was not asked to find, that the amount of drugs involved in the conspiracy met or exceeded the statutory threshold for a life term. The jury's guilty verdict therefore did not support a sentence in excess of twenty years. Id. at
657. Nonetheless, we concluded that the error did not implicate the integrity and fairness of the judicial process so as to warrant relief under the plain error standard. Id. at 657-58. Having reviewed the trial record, we found that the evidence indicating the conspiracy involved the statutorily required amount of narcotics was so overwhelming as to leave no doubt that a properly instructed jury would have found that threshold satisfied. Id. at 658.*fn2

Young filed a petition for rehearing. With respect to the Apprendi issue, Young noted that in contrast to the other defendants, his counsel had, in fact made a Sixth Amendment argument at sentencing that anticipated the Apprendi decision. Consequently, Young maintained, his Apprendi challenge was not subject to limited, plain error review, and because the court had already found that an Apprendi error had occurred, he was entitled to relief in the form of de novo resentencing. In its answer to Young's petition, submitted at our request, the government did not contest Young's assertion that he had timely raised a Sixth Amendment argument in the district court and was therefore entitled to relief

under Apprendi. Rather, the government contended that the point was moot because this court had vacated each of the defendant's sentences and remanded for resentencing in light of the other errors the court had identified. Consequently, the government reasoned, Young as well as the other defendants were to be re-sentenced on the conspiracy charge and any Apprendi error would be taken care of in re-sentencing.

We denied Young's petition for rehearing without comment. The Supreme Court subsequently denied the petition for a writ of certiorari filed by Mansoori, Cox, and Young. Cox v. United States, 538 U.S.967, 123 S.Ct. 1761 (2003).

On remand, the government performed an about-face and contended that because this court had not vacated Young's sentence as a whole and had not directed that Young be re-sentenced on the conspiracy conviction, Young was not entitled to de novo re-resentencing. See R. 808, 810, 839. After entertaining the parties' memoranda as to the scope of the remand, the district court concluded that the only issues to be addressed with respect to Young's sentence were Young's request for a downward departure based on his purportedly diminished mental capacity, correction of the sentence on Count Two to conform with the statutory maximum of twenty years, the payment of community restitution, and the special assessment

imposed as to the Count Fourteen money laundering charge. R. 851, R. 884 at 4-5, R. 1012-2 at 27-28. The court rejected the possibility of re-visiting the life sentence imposed on Young on the Count One conspiracy conviction in light of the Apprendi error we had acknowledged on appeal. R. 1012-2 at 30; see also R. 851, R. 884 at 4-5.

With respect to Young's co-defendants, the district court similarly concluded that the discrete errors that had prompted this court to vacate their sentences (the erroneous life term on Count Two for Choice, the excessive special assessments on Mansoori's monetary offenses, and the order that all defendants pay community restitution) did not entitle them to completely new sentences that would conform with the Apprendi decision. R. 851, R. 884 at 4-5. As to each defendant, the court re-imposed the life sentence on Count One that it had originally ordered each defendant to serve. R. 891, R. 892, R. 939, R. 1000.

The remand consequently had little appreciable impact on any of the appellants' sentences. The court denied Young's request for a diminished-capacity departure, R. 1012-2 at 28, and as to Count Two re-sentenced both Young and Choice to twenty-year terms, to be served
concurrently with their life sentences on Count One. The court rescinded the original requirement that all defendants pay community restitution. And the court corrected the special assessments that Young

and Mansoori owed on their convictions for monetary offenses.

Thusly the defendants have arrived back in this court, asserting as they did below that they are entitled to de novo re-sentencing subject to maximum prison terms of twenty years on their Count One conspiracy convictions in conformity with Apprendi.

II.

We begin our review with Choice, Cox, and Mansoori. None of these three defendants argued prior to their original sentencings that the Sixth Amendment precluded the district court from making the factual findings necessary to raise the statutory maximum prison term on their Count One convictions for narcotics conspiracy from twenty years to life. It was for that reason in Mansoori I that we reviewed the Apprendi challenge to their
life sentences on Count One for plain error; and, as we have discussed, we concluded that there was no plain error because a properly instructed jury surely would have found the threshold amount of cocaine and/or heroin necessary to permit a life term. 304 F.3d at 657-58.

Despite our affirmance of their life terms, Choice, Cox, and Mansoori contend that the district court should have re-sentenced them de novo on remand and, in compliance with Apprendi, imposed terms of no greater than twenty years on Count One. Specifically, they argue that the

district court misconstrued our remand order as one confined to correcting the discrete sentencing errors we identified in the prior appeal. As a fallback, these defendants contend that because their corrected sentences on remand were imposed prior to the Supreme Court's decision in Booker and the district court consequently treated the Sentencing Guidelines as binding, they are entitled to remands pursuant to our decision in
Paladino.

An observation is in order at the outset. As we have noted, the government, in opposing the petition for rehearing that Young filed following this court's decision in Mansoori I, represented that in view of this court's decision to vacate the defendants' sentences, the defendants
would of course be re-sentenced de novo and in compliance with Apprendi on remand. Although the government quickly abandoned (and contradicted) that view on remand, the defendants have suggested that the government's original concession that the defendants were entitled to de novo re-sentencing amounts to a judicial admission that entitles them to that relief. However, the government's representations on this subject are beside the point as far as we are concerned. The scope of the Mansoori I remand is, in the first instance, a question of what this court intended when it vacated the defendants' sentences and remanded for re-sentencing, and, in the second instance, a question of the district court's

sentencing discretion. See United States v. White, 406 F.3d 827, 831-33 (7th Cir. 2005), cert. denied, 127 S.Ct. 552 (2006). The government's original understanding of our prior decision, right or wrong, cannot bind us as we examine the scope of the relief we ordered and then consider whether the district court complied with our mandate. See Sibron v. New York, 392 U.S. 40, 58, 88 S.Ct. 1889, 1900 (1968); Ren v. Gonzales, 440 F.3d 446, 448(7th Cir. 2006). This is true both as to Young and the other defendants.

That said, we conclude that the district court was not obliged to re-sentence Choice, Cox, and Mansoori de novo on remand from the prior appeal. It is true that we vacated their sentences generally without imposing any express limitations on the scope of the re-sentencing, and vacation of a sentence nominally results in a clean slate. See White, 406 F.3d at 832 (collecting cases). In the absence of any limiting language in Mansoori I, we may assume that the district court had the discretion to unbundle and adjust the defendants' sentencing packages as necessary in order to effectuate its sentencing intent while rectifying the errors we had identified. See White at 832-33. Yet, none of the discrete errors we identified in Mansoori I implicated life terms imposed on Count One, nor did the correction of those errors necessitate unbundling of the defendants' overall sentences. Relieving all three of these defendants of the obligation to pay

community restitution and reducing the special assessment that Mansoori was obliged to pay on his monetary offenses had
nothing whatsoever to do with their prison terms. And although Choice's
sentence on Count Two was reduced from life to twenty years, the admittedly significant reduction of that concurrent sentence had no impact on the overall term that Choice was ordered to serve. It was the life term imposed on each defendant pursuant to their convictions on Count One that dictated the overall length of their sentences, and we expressly held in Mansoori I that the life sentences were not plainly erroneous. 304 F.3d at 657-58. Whatever discretion our decision to vacate the defendants' sentences may have given the district court on remand, the court certainly did not abuse that discretion in declining to re-visit their life terms on Count One and to re-sentence them from scratch.

However, when it re-sentenced these defendants, the district court did treat the Sentencing Guidelines as mandatory in accord with pre-Booker precedent. The defendants did not preserve a Booker-type objection below, so our review is solely for plain error, as the defendants concede. See Joint Opening Brief of Defendants Mansoori, Cox, and Choice at 14
("Clearly review under plain error continues to apply here."); Paladino, 401 F.3d at 481. Whether or not these defendants are entitled to yet another re-

sentencing in light of Booker turns on whether the district court might have sentenced differently knowing that the Guidelines are merely advisory. Id. at 483-84. The record as it stands does not supply us with an answer to that question. Accordingly, Mansoori, Cox, and Choice are each entitled to a remand so that the district court can consider whether it might have sentenced them more leniently knowing that the Guidelines are advisory rather than binding. See id. at 484; United States v. Williams, 410 F.3d 397, 404 (7th Cir. 2005), cert. denied, 126 S.Ct. 1182 (2006). If the district court answers this question in the affirmative as to any of these defendants, then plain error will have been established and that defendant will be entitled to resentencing. Paladino, 401 F.3d at 484; Williams, 410 F.3d at 404. If not, then their current sentences will remain undisturbed so long as we find them to be reasonable. Paladino, 401 F.3d 484.

We reject the defendants' additional contention that due process entitles them to more than the limited remand we described in Paladino, specifically an unrestricted opportunity-including an evidentiary hearing, if necessary-to present evidence relevant to the sentencing factors identified in 18 U.S.C. § 3553(a). Paladino itself affords both parties a reasonable opportunity to make written proffers of the evidence they believe relevant to the district court's exercise of its broad sentencing discretion under section 3553(a). 401 F.3d at 484. But as we

observed in United States v. Della Rose, 435 F.3d 735, 736-37 (7th Cir.), cert. denied, 126 S.Ct. 2044 (2006), a Paladino remand does not necessarily entitle a defendant to an evidentiary hearing. In many if not most cases, the parties' written submissions will be all the court needs to answer the question posed by the Paladino remand. Id. The district court is in the best position to know what circumstances influenced its original sentencing decision and what information it now requires in order to determine whether it might have sentenced any defendant differently freed of the constraints of the Guidelines. There is no need for us to dictate in advance what steps, if any, the district court must take beyond soliciting the parties' written submissions and giving those submissions due consideration.

III.

Young's appeal is premised on the notion that he, unlike his co-defendants, preserved an Apprendi challenge at his original sentencing and as a result is entitled to de novo re-sentencing subject to a maximum prison term of twenty years on Count One. Because Young's counsel made an Apprendi-like argument at the time of his original sentencing, he maintains that we were wrong to say in Mansoori I that all of the defendants, including Young, had failed to preserve the Apprendi argument and to confine our review to one for plain error only. 304 F.3d at 657. As he sees it, the district court then compounded our error when, on remand, it left in

place his life sentence on Count One. Allowing for the possibility that Young might yet prevail on his Apprendi claim, the district court did indicate that if we were to decide that Young was subject to a maximum term of years on Count One, it would impose that term to be followed by consecutive terms of twenty years on Count Two (the distribution charge) and another twenty years on Count Fourteen (the money laundering charge), for a total term of sixty years. R. 1012-2 at 29-30.

But Young characterizes this alternative sentence as suspect, apparently because it reflects an unwillingness to sentence him afresh, if not a vindictive intent to punish him in the event he prevailed in this appeal.

Accordingly, Young urges us to set aside the law of the case doctrine, recognize belatedly that he preserved his Apprendi argument, vacate his life term on Count One, and order him to be re-sentenced de novo subject to a maximum prison term of twenty years on that count.

We recognize that Young may have been in a different position with respect to his preservation of the Apprendi argument. A footnote in the defendants' opening brief in the prior appeal did note Young's counsel had raised an Apprendi-like argument at sentencing; the same observation was made in a footnote in the reply brief as well. Our decision did not address that distinction nor consider whether

Young, in contrast to the other defendants, had preserved the Apprendi claim.

It is debatable whether Young actually did preserve the argument. Young's counsel did file a written objection that quite accurately predicted Apprendi's holding. However, the objection was not filed until the day of Young's sentencing, beyond the deadline set by the district court for objections to the probation officer's pre-sentence report (which, of course, assumed a sentence of life on Count One was permissible notwithstanding the lack of a jury verdict as to the amount of narcotics involved in the conspiracy). Young's objection relied on the precursor to Apprendi-the Supreme Court's decision in Jones v. United States, 526 U.S. 227, 119 S.Ct. 1215 (1999)-which was decided on March 24, 1999, nearly six months before Young's sentencing on Wednesday, September 22, 1999. As Young's counsel conceded at sentencing, nothing prevented him from making his Jones objection in a timely manner. Young Sentencing Tr. (Sept. 22, 1999) at 6. Although the district court went on to address (and reject) the merits of the objection, it found at the outset that the objection was late and cited the untimeliness of the objection as its first reason for overruling the objection. Id. at 10 ("First of all, it will be denied as untimely. . ."), 11 ("I said both untimely and on the merits.").

Young's contention that he preserved the Apprendi argument by raising it at sentencing thus de-

pends on us ignoring the district court's threshold determination that the argument was not timely made.

Nonetheless, we may set the timeliness question aside, keeping in mind that the government itself, in responding to Young's petition for rehearing in the prior appeal, did not contest the notion that Young had preserved the argument. But even assuming that he did preserve the Apprendi challenge, Young would not automatically be entitled to de novo re-sentencing subject to a twenty-year maximum prison term, as he assumes.

A sentence imposed in violation of Apprendi will nonetheless stand if the Apprendi error was harmless. See Fed. R. Crim. P. 52(a) ("[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded") (emphasis ours); e.g., United States v. Dumes, 313 F.3d 372, 384-85 (7th Cir. 2002); United States v. Adkins, 274 F.3d 444, 454-55 (7th Cir. 2001); United States v. Nance, 236 F.3d 820, 825 (7th Cir. 2000); see also Knox v. United States, 400 F.3d 519, 523(7th Cir.), cert. denied, 126 S.Ct. 358 (2005). In other words, the lack of a jury finding as to drug quantity does not preclude a reviewing court from concluding that the evidence of the requisite quantity was so strong as to leave no doubt as to what the jury's finding on that subject would
have been.

If the court is persuaded beyond a reasonable doubt that a properly instructed jury would have found the necessary drug quantity, then the error is harmless. Dumes, 313 F.3d at 384-85; Nance, 236 F.3d at 825-26.

Notably, the relevant inquiry on harmlessness review in Apprendi cases is the same inquiry posed on plain error review. See Nance, 236 F.3d at 825. As we observed in Nance, "Whether or not we are applying the stringent plain error screen, the Apprendi error . . . requires us to ask whether it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty beyond a reasonable doubt.' " Id., quoting Neder v. United States, 527 U.S. 1, 18, 119 S.Ct. 1827, 1838 (1999); see also United States v. Olano, 507 U.S. 725, 734, 113 S.Ct. 1770, 1777-78 (1993). The key distinction between the harmless error and plain error analyses lies in the assignment of the burden of persuasion-in plain error cases, it is the defendant's burden to prove that the error was prejudicial, whereas in harmless error cases it is the government's burden to prove that the error was not prejudicial. Id. at 734-35, 113 S.Ct. at 1778. In either case, however, an appeals court is looking to the same record and engaging in the same basic inquiry to determine whether the error affected the outcome below and in that sense prejudiced the defendant. See Nance, 236 F.3d at 825.

We have already evaluated the impact of the Apprendi error and concluded that it did not affect the outcome insofar as the lengths of the defendants' sentences on Count One are concerned. In Mansoori I, we concluded upon review of the trial record that a properly instructed jury would have found the defendants guilty of conspiring to distribute the quantity of narcotics necessary to permit life sentences on Count One. 304 F.3d at 658. "The jury convicted the defendants on the conspiracy charge, and the record leaves no doubt that the conspiracy involved the
distribution of far more than five kilograms of cocaine and/or one kilogram of heroin." Id. We cited multiple examples of trial testimony which led us to this conclusion, id., and our closing words on the subject made clear that we did not view the question as a close one:

[T]he evidence before the jury consistently and overwhelmingly demonstrated that the defendants were distributing cocaine and heroin on a very large scale. In view of that evidence, there can be no doubt that the jury would have found that the offense involved the threshold amount of five kilograms of cocaine and/or one kilogram of heroin as necessary to authorize prison terms of life for defendants Young, Mohammad Mansoori, Cox, and Choice.Id. (emphasis supplied), citing Nance, 236 F.3d at 826. That we rendered this assessment on plain error review makes no difference insofar

as Young is concerned. We engaged in the same analysis of the evidence that we would have engaged in had we determined that Young-or for that matter any or all of the defendants-had properly preserved an Apprendi argument. See id. at 825. We resolved the inquiry adversely to Young and his co-defendants, concluding that the Apprendi error did not prejudice them. That holding is the law of the case.

Thus, even if Young did preserve his Apprendi argument, contrary to our assumption in Mansoori I, it would make no difference in terms of Young's entitlement to relief. Our holding in Mansoori I that the Apprendi error did not affect the outcome in terms of the defendants' responsibility for the requisite drug amounts makes clear that error was harmless, and it therefore forecloses the relief that Young is seeking: de novo re-sentencing subject to a maximum prison term of twenty years on Count One.

We have considered whether Young might be entitled to re-sentencing or alternatively to a Paladino remand in light of the Supreme Court's Booker decision, but we conclude that he is not so entitled. In contrast to the three other appellants, Young was re-sentenced after Booker was decided. At that time, the government suggested that the district court take the opportunity, after it addressed the particular errors that had prompted the remand, to articulate an alternative sentence on all counts of

conviction that would comply with the Booker decision. The court declined to take that step. R. 1012-2 at 29.*fn3 However, the court did make clear on the record that it would not sentence Young any differently notwithstanding the advisory nature of the Guidelines. Id. In so stating, the court made clear that it understood it was not bound by the Guidelines, and it eliminated any need for us to order a Paladino remand. See United States v. Julian, 427 F.3d 471, 491 (7th Cir. 2005), cert. denied, 126 S.Ct. 1444 (2006). The sentence was otherwise reasonable-it was within the Guidelines range, making it presumptively reasonable, and Young makes no argument that any of the sentencing factors identified in 18 U.S.C. § 3553(a) weigh so strongly in favor of a lesser sentence as to rebut this presumption. See United States v. Williams, 425 F.3d 478, 481 (7th Cir. 2005), cert. denied, 126 S.Ct. 1182 (2006).

IV.

For the reasons set forth above, defendants Mohammad Mansoori, Cox, and Choice were not entitled to de novo re-sentencing on remand from this court's prior decision in Mansoori I. They are, however, entitled to Paladino remands at this juncture so that the district court may consider whether it might have sentenced them differently knowing that the

Sentencing Guidelines are advisory rather than binding. We therefore REMAND the sentences of

Mansoori, Cox, and Choice to the district court pursuant to Paladino and retain jurisdiction over their appeals pending the outcome of that remand.

Young is not entitled to de novo re-sentencing notwithstanding his contention that he properly preserved his Apprendi argument and that this court erred in reviewing that argument for plain error in Mansoori I. Even if Young did preserve the argument, the Apprendi error was harmless for the same reasons we concluded the error was not plain error in Mansoori I: a properly instructed jury surely would have found beyond a reasonable doubt that the conspiracy charged in Count One involved at least five kilograms of cocaine and/or one kilogram of heroin. A Paladino remand is not necessary as to Young. The district court has stated that it would not sentence Young differently treating the Guidelines as advisory rather than binding. His sentence is a reasonable one. We therefore AFFIRM Young's sentence.

Opinion Footnotes

*fn1 Pursuant to Seventh Circuit Internal Operating Procedure 6(b), these successive appeals were submitted to the panel of judges that disposed of the defendants' direct appeals of their convictions and sentences. See United States v. Mansoori, 304 F.3d 635 (7th Cir. 2002).

Judge Wood, who was a member of the original panel, has recused herself from consideration of the instant appeals, and Judge Manion was selected at random to replace her. None of the parties has included in its brief a statement indicating that oral argument is necessary, see Fed. R. App. P. 34(a)(1) and Circuit Rule 34(f), and upon review of the briefs and the record and consideration of the standards set forth in Fed. R. App. 34(a)(2), the panel has determined that oral argument is unnecessary to the resolution of these appeals. The appeals have therefore been submitted on the briefs and the record.

*fn2 We reached a different conclusion with respect to the concurrent life terms imposed as to Young and Choice as to Count Two of the indictment, which charged them with possessing with the intent to distribute one kilogram of cocaine in violation of 21 U.S.C. § 841(a)(1). Given that Young and Choice were alleged to have possessed no more than one kilogram of cocaine in this charge, the maximum possible prison term
that could be imposed on them was forty years rather than life. See 21 U.S.C. § 841(b)(1)(B)(ii). So the life sentences on Count Two were erroneous irrespective of the fact that the jury, as with the Count One conspiracy charge, had not been asked to make a finding as to the amount of narcotics that Young and Choice had distributed. 304 F.3d at 659.

Consequently, re-sentencing on Count Two was required even if we had no doubt that the jury would have found that Young and Choice had distributed the one-kilogram quantity of cocaine alleged in the indictment. Id. And in re-sentencing these two defendants on Count Two, the district court would of course have to comply with Apprendi. Id. Consequently, in the absence of a jury finding as to the relevant drug quantity, the district court on remand could (and did) impose a sentence of no greater than twenty years. Id.

*fn3 As we have noted, the court did provide for an alternative total sentence of sixty years in the event that this court held Young subject to a maximum prison term of twenty years on Count One. But this was a sentence aimed at a possible Apprendi problem with the statutory maximum term rather than one which properly treated the Sentencing Guidelines as advisory in compliance with Booker.

♦♦♦

Young's Forfeiture Case:

[U] Young v. United States, No. 06-2591 (7th Cir. 04/06/2007)

United States Court of Appeals For the Seventh Circuit

No. 06-2591

April 6, 2007

TERRY B. YOUNG, PLAINTIFF-APPELLANT,

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE.

Appeal from the United States District Court for the Northern

District of Illinois, Eastern Division No. 02 C 390 George W. Lindberg, Judge.

NONPRECEDENTIAL DISPOSITION To be cited only in accordance with Fed. R. App. P. 32.1

Submitted April 4, 2007*fn1

Before Hon. RICHARD A. POSNER, Circuit Judge, Hon. DIANE P. WOOD, Circuit Judge, Hon. ANN CLAIRE WILLIAMS, Circuit Judge

ORDER

More than five years after he was convicted for his role in a drug ring, Terry Young moved for the return of funds that he says were "taken" by the district court as part of a defective criminal forfeiture. Young cited Federal Rule of Criminal Procedure 41 as the basis for this motion, which the district court denied because Young had made the same argument in a prior, unsuccessful motion. Young appeals, but we conclude that the

district court lacked subject-matter jurisdiction over his motion.

Young was a high-ranking member of the Traveling Vice Lords, a Chicago street gang. A jury found him guilty of drug crimes and money laundering, and also returned a special verdict finding that Young and his coconspirators netted proceeds of $6 million. Prior to sentencing the district court entered

a "preliminary" order of criminal forfeiture, see 18 U.S.C. § 982; 21 U.S.C. § 853; Fed. R. Crim.P.32(d)(2)(Dec. 1, 1996)(superseded by Fed. R. Crim. P 32.2(b) effective Dec. 1, 2000), which divested Young of his interest in specific property traceable to the proceeds or identified by the government as substitute assets. In September 1999 the court sentenced Young to life imprisonment on the drug counts and 20 years on the money-laundering charge. In the judgment of conviction the court also ordered that Young "shall forfeit" his interest in the $6 million. A "final" order of forfeiture, see 18 U.S.C. § 982(b)(1); 21 U.S.C. § 853(n), was entered in October 1999 and amended in December 1999. Young filed a direct appeal but raised no issue concerning the criminal forfeiture. We upheld his convictions but remanded for resentencing, United States v. Mansoori, 304 F.3d 635, 642 (7th Cir. 2002). On remand the district court again imposed an overall sentence of life, which we recently upheld. United States v. Mansoori, __ F.3d __, 2007 WL 738973 (7th Cir. Mar. 13, 2007).

Young filed his current "Rule 41" motion in November 2005. In that motion he demands that the government return a small amount of currency seized from his house plus the proceeds of a bank account, cashiers check, and certificate of deposit. All of these funds, which total roughly $133,000, are specifically identified as substitute assets in the "preliminary" and "final" orders of forfeiture, see 21

U.S.C. Â§ 853(p),but they are not itemized in the judgment of conviction. Young, who says nothing about the $6 million forfeiture that is in the judgment of conviction, argues based upon his reading of former Rule 32(d)(2) of the Federal Rules of Criminal Procedure that the currency and other items comprising the $133,000 were not criminally forfeited because they are not listed in the judgment of conviction. See Fed. R. Crim. P. 32(d)(2)(Dec. 1, 1996) ("At sentencing, a final order of forfeiture shall be made part of the sentence and included in the judgment."). Instead, says Young, the district court took the funds without jurisdiction when it entered the amended "final" order of forfeiture in December 1999. Young made the identical argument in an earlier "Rule 41" motion that was filed and denied while his initial appeal was pending, and in denying the present motion the district court explained that it would not "revisit its prior decision denying return of the property."

In our view, Young's motion is best seen as an improper attempt to challenge a component of his sentence. Although we have recognized that a motion labeled as one under Rule 41 is sufficient to commence a civil equitable proceeding to recover seized property that the government has retained after the end of a criminal case, United States v. Sims, 376 F.3d 705, 708 (7th Cir. 2004); United States v. Solis, 108 F.3d 722, 722 (7th Cir. 1997), a criminal forfeiture is part of the defendant's sen-

tence and must be challenged on direct appeal or not at all, see United States v. Machado, 465 F.3d 1301, 1305-06 (11th Cir. 2005); United States v. Apampa, 179 F.3d 555, 557 (7th Cir. 1999) (per curiam); United States v. Mosavi, 138 F.3d 1365, 1366 (11th Cir. 1998); see also Sims, 376 F.3d at 708 (noting that Rule 41 may be invoked "after criminal proceedings have concluded to recover the defendant's property when the property is no longer needed as evidence-unless, of course, it has been forfeited in the course of those proceedings" (emphasis added)). Young wrongly concludes that the amended "final" order of forfeiture entered in December 1999 affected his interest in the funds; that order resolved the rights of third parties, not Young. See 21 U.S.C. Â§ 853(k), (n); United States v. Pelullo, 178 F.3d 196, 202 (3d Cir. 1999); United States v. Messino, 122 F.3d 427, 428 (7th Cir. 1997); see generally Fed. R. Crim. P.32.2(c)(providing for post-sentencing, ancillary proceeding to resolve third-party claims to criminally forfeited property). Young's interest in the disputed funds was resolved through the jury's verdict, the "preliminary" order of forfeiture, and the judgment of conviction. See Fed. R. Crim. P. 32(d)(2) (Dec. 1, 1996) (superseded by Fed. R. Crim. P 32.2(b) effective Dec. 1, 2000); Pelullo, 178 F.3d at 202; United States
v. Christunas, 126 F.3d 765, 767 (6th Cir. 1997); Messino, 122 F.3d at 428.

We are not persuaded by Young's contention that the funds were never forfeited simply because the specific items are not written into the judgment of conviction. Young does cite one opinion questioning the validity of a criminal forfeiture where the judgment of conviction is altogether silent about forfeiture, see United States v. Pease, 331 F.3d 809, 811, 813-15 (11th Cir. 2003); see also United States v. Gilbert, 244 F.3d 888, 923-26 (11th Cir. 2001); United States v. Coon, 187 F.3d 888,901 (8th Cir. 1999), but Young's judgment-which orders him to forfeit $6 million-is hardly silent. Moreover, we have suggested disagreement with the conclusion that a failure to incorporate the order of forfeiture into the judgment of conviction undermines a criminal forfeiture, see Apampa, 179 F.3d at 556 ("Nor did the fact that the district judge specified the punishment in two documents (one providing imprisonment and the other forfeiture) affect the time to appeal; this remains a 'defendant's' appeal in 'a criminal case'."), as have other circuits, see United States v. Yeje-Cabrera, 430 F.3d 1, 15 (1st Cir. 2005) (opining that rule of procedure requiring criminal forfeiture to be incorporated into judgment of conviction "is largely a housekeeping rule and does not itself go to any fundamental rights of defendants"); United States v. Bennett, 423 F.3d 271, 273-74, 282 (3d Cir. 2005) (failure to mention criminal forfeiture at sentencing hearing or in judgment of conviction did not invalidate forfeiture

that otherwise complied with statutory requirements; omission of forfeiture from judgment of conviction is "far less substantive than a failure to include other penalties, which do not typically stem from preliminary post-conviction orders"); United States v. Loe, 248 F.3d 449, 464 (5th Cir. 2001) (where district court had entered preliminary order of forfeiture before sentencing and ordered forfeiture orally at the sentencing hearing, criminal forfeiture was valid despite absence of specific reference in judgment of conviction).

The judgment of conviction unquestionably orders Young to forfeit $6 million, and with criminal forfeiture the government is always free to pursue substitute assets like the funds Young wants back. 21 U.S.C. Â§ 853(p); United States v. MislaAldarondo, 478 F.3d 52, 74-75 (1st Cir. 2007); United States v. Alamoudi, 452 F.3d 310, 312-14 (4th Cir. 2006).

Thus his motion appears to have little arguable merit. The motion, though, really concerns the extent of the forfeiture language in the judgment of conviction, and that, we conclude, is a challenge to the judgment itself.

But a district court's jurisdiction to alter a judgment of conviction after sentencing is extremely limited, e.g., United States v. Smith, 438 F.3d 796, 799-801 (7th Cir. 2006); United States v. Zingsheim, 384 F.3d 867, 871 (7th Cir. 2004), and we are aware of no exception that would authorize

Young's belated challenge to a criminal forfeiture that could have been challenged on direct appeal. Accordingly, the judgment of the
district court is MODIFIED to reflect a dismissal for lack of subject matter jurisdiction, and as modified the judgment is AFFIRMED.

Opinion Footnotes
*fn1 After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus the appeal is submitted on the briefs and the record. Fed. R. App. P. 34(a)(2).

ΩΩΩ

The following Constitutinal provisions are involved in the Petition for Writ of Certiorari:

Article I, § 8:
The Congress shall have power
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To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;
***
To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;
***
To provide for the punishment of counterfeiting the securities and current coin of the United States;

***

To constitute tribunals inferior to the Supreme Court;

***

To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

***

To make rules for the government and regulation of the land and naval forces;

***

To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings;--And
To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

Article I, § 9:

***

No ...ex post facto Law shall be passed.

5th Amendment:
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger;... nor be deprived of life, liberty, or property, without due process of law...

6th Amendment:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

7th Amendment:
In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

ΩΩΩ

The following Statutory provisions as in effect at the relevant time are involved in this Petition for Writ of Certiorari:

18 USC 1956:
Laundering of monetary instruments
(a)
(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

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(B) knowing that the transaction is designed in whole or in part—
(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity;

***

shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

18 USC 3143(b)(1):
Release or detention of a defendant pending sentence or appeal

(b) Release or Detention Pending Appeal by the Defendant.—

(1) Except as provided in paragraph (2), the judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds—

(A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142 (b) or (c) of this title; and

(B) that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in—

(i) reversal,

(ii) an order for a new trial,

(iii) a sentence that does not include a term of imprisonment, or

(iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

If the judicial officer makes such findings, such judicial officer shall order the release of the person in accordance with section 3142 (b) or (c) of this title, except that in the circumstance described in subparagraph (B)(iv) of this paragraph, the judicial officer shall order the detention terminated at the expiration of the likely reduced sentence.

18 USC 3145(c):
Review and appeal of a release or detention order
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(c) Appeal From a Release or Detention Order.—An appeal from a release or detention order, or from a decision denying revocation or amendment of such an order, is governed by the provisions of section 1291 of title 28 and section 3731 of this title. The appeal shall be determined promptly. A person subject to detention pursuant to section 3143 (a)(2) or (b)(2), and who meets the conditions of release set forth in section 3143 (a)(1) or (b)(1), may be ordered released, under appropriate conditions, by the judicial officer, if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate.

18 USC 3331:
Summoning and term
(a) In addition to such other grand juries as shall be called from time to time, each district court which is located in a judicial district containing more than four million inhabitants or in which the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any designated Assistant Attorney General, certifies in writing to the chief judge of the district that in his judgment a special grand jury is necessary because of criminal activity in the district shall order a special grand jury to be summoned at least once in each period of eighteen

months unless another special grand jury is then serving. The grand jury shall serve for a term of eighteen months unless an order for its discharge is entered earlier by the court upon a determination of the grand jury by majority vote that its business has been completed. If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

(b) If a district court within any judicial circuit fails to extend the term of a special grand jury or enters an order for the discharge of such grand jury before such grand jury determines that it has completed its business, the grand jury, upon the affirmative vote of a majority of its members, may apply to the chief judge of the circuit for an order for the continuance of the term of the grand jury. Upon the making of such an application by the grand jury, the term thereof shall continue until the entry upon such application by the chief judge of the circuit of an appropriate order. No special grand jury term so extended shall exceed thirty-six months, except as provided in subsection (e) of section 3333 of this chapter.

18 USC 3332:

Powers and duties

(a) It shall be the duty of each such grand jury impaneled within any judicial district to inquire into offenses against the criminal laws of the United States alleged to have been committed within that district. Such alleged offenses may be brought to the attention of the grand jury by the court or by any attorney appearing on behalf of the United States for the presentation of evidence. Any such attorney receiving information concerning such an alleged offense from any other person shall, if requested by such other person, inform the grand jury of such alleged offense, the identity of such other person, and such attorney's action or recommendation.

(b) Whenever the district court determines that the volume of business of the special grand jury exceeds the capacity of the grand jury to discharge its obligations, the district court may order an additional special grand jury for that district to be impaneled.

18 USC 3333:

Reports

(a) A special grand jury impaneled by any district court, with the concurrence of a majority of its members, may, upon completion of its original term, or each extension thereof, submit to the court a report—

(1) concerning noncriminal misconduct, malfeasance, or misfeasance in office involving organized

criminal activity by an appointed public officer or employee as the basis for a recommendation of removal or disciplinary action; or

(2) regarding organized crime conditions in the district.

(b) The court to which such report is submitted shall examine it and the minutes of the special grand jury and, except as otherwise provided in subsections (c) and (d) of this section, shall make an order accepting and filing such report as a public record only if the court is satisfied that it complies with the provisions of subsection (a) of this section and that—

(1) the report is based upon facts revealed in the course of an investigation authorized by subsection (a) of section 3332 and is supported by the preponderance of the evidence; and

(2) when the report is submitted pursuant to paragraph (1) of subsection (a) of this section, each person named therein and any reasonable number of witnesses in his behalf as designated by him to the foreman of the grand jury were afforded an opportunity to testify before the grand jury prior to the filing of such report, and when the report is submitted pursuant to paragraph (2) of subsection (a) of this section, it is not critical of an identified person.

(c)

(1) An order accepting a report pursuant to paragraph (1) of subsection (a) of this section and the report shall be sealed by the court and shall not be

filed as a public record or be subject to subpena or otherwise made public
(i) until at least thirty-one days after a copy of the order and report are served upon each public officer or employee named therein and an answer has been filed or the time for filing an answer has expired, or
(ii) if an appeal is taken, until all rights of review of the public officer or employee named therein have expired or terminated in an order accepting the report. No order accepting a report pursuant to paragraph (1) of subsection (a) of this section shall be entered until thirty days after the delivery of such report to the public officer or body pursuant to paragraph (3) of subsection (c) of this section. The court may issue such orders as it shall deem appropriate to prevent unauthorized publication of a report. Unauthorized publication may be punished as contempt of the court.
(2) Such public officer or employee may file with the clerk a verified answer to such a report not later than twenty days after service of the order and report upon him. Upon a showing of good cause, the court may grant such public officer or employee an extension of time within which to file such answer and may authorize such limited publication of the report as may be necessary to prepare such answer. Such an answer shall plainly and concisely state the facts and law constituting the defense of the public officer or employee to the charges in said report, and, except for those parts thereof which the court

determines to have been inserted scandalously, prejudiciously, or unnecessarily, such answer shall become an appendix to the report.

(3) Upon the expiration of the time set forth in paragraph (1) of subsection (c) of this section, the United States attorney shall deliver a true copy of such report, and the appendix, if any, for appropriate action to each public officer or body having jurisdiction, responsibility, or authority over each public officer or employee named in the report.

(d) Upon the submission of a report pursuant to subsection (a) of this section, if the court finds that the filing of such report as a public record may prejudice fair consideration of a pending criminal matter, it shall order such report sealed and such report shall not be subject to subpena or public inspection during the pendency of such criminal matter, except upon order of the court.

(e) Whenever the court to which a report is submitted pursuant to paragraph (1) of subsection (a) of this section is not satisfied that the report complies with the provisions of subsection (b) of this section, it may direct that additional testimony be taken before the same grand jury, or it shall make an order sealing such report, and it shall not be filed as a public record or be subject to subpena or otherwise made public until the provisions of subsection (b) of this section are met. A special grand jury term may be extended by the district court beyond thirty-six months in order that such additional testimony may

be taken or the provisions of subsection (b) of this section may be met.
(f) As used in this section, "public officer or employee" means any officer or employee of the United States, any State, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any political subdivision, or any department, agency, or instrumentality thereof.

18 USC 3334:
General provisions
The provisions of chapter 215, title 18, United States Code, and the Federal Rules of Criminal Procedure applicable to regular grand juries shall apply to special grand juries to the extent not inconsistent with sections 3331, 3332, or 3333 of this chapter.

18 USC 3553(b):
Imposition of a sentence
(b) Application of Guidelines in Imposing a Sentence.—
(1) In general
Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should

result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

18 USC 3559(a)(5):
Sentencing classification of offenses
(a) Classification.— An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is—
(5) less than five years but more than one year, as a Class E felony;

18 USC 3583:
Inclusion of a term of supervised release after imprisonment
(a) In General.— The court, in imposing a sentence to a term of imprisonment for a felony or a misde-

meanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute...

(b) Authorized Terms of Supervised Release.— Except as otherwise provided, the authorized terms of supervised release are—

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(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(c) Factors To Be Considered in Including a Term of Supervised Release.— The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553 (a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).

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18 USC 3742(e):

Review of a sentence

(e) Consideration.— Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;
(3) is outside the applicable guideline range, and
(A) the district court failed to provide the written statement of reasons required by section 3553 (c);
(B) the sentence departs from the applicable guideline range based on a factor that—
(i) does not advance the objectives set forth in section 3553 (a)(2); or
(ii) is not authorized under section 3553 (b); or
(iii) is not justified by the facts of the case; or
(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553 (a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553 (c); or
(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.
The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court

of appeals shall review de novo the district court's application of the guidelines to the facts.

21 USC 841:
Prohibited acts A
(a) Unlawful acts
Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.
(b) Penalties
Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
(1)

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(C) In the case of a controlled substance in schedule I or II except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years...

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21 USC 846:
Attempt and conspiracy
Any person who attempts or conspires to commit any offense defined in this subchapter shall be sub-

ject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 USC 853(b)(2):
Criminal forfeitures
(b) Meaning of term "property"
Property subject to criminal forfeiture under this section includes—

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(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

21 USC 881:
Forfeitures
(a) Subject property
The following shall be subject to forfeiture to the United States and no property right shall exist in them:
(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.
(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance or listed chemical in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).
(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9).
(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.
(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance or listed chemical in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter.
(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment.
(8) All controlled substances which have been possessed in violation of this subchapter.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, dispensed, acquired, or intended to be distributed, dispensed, acquired, imported, or exported, in violation of this subchapter or subchapter II of this chapter.

(10) Any drug paraphernalia (as defined in section 863 of this title).

(11) Any firearm (as defined in section 921 of title 18) used or intended to be used to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2) and any proceeds traceable to such property.

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(d) Other laws and proceedings applicable

The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be

performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

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(h) Vesting of title in United States

All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

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28 USC 144:

Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a

certificate of counsel of record stating that it is made in good faith.

28 USC 455:
Disqualification of justice, judge, or magistrate judge
(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
(b) He shall also disqualify himself in the following circumstances:
(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any

other interest that could be substantially affected by the outcome of the proceeding;
(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
(i) Is a party to the proceeding, or an officer, director, or trustee of a party;
(ii) Is acting as a lawyer in the proceeding;
(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.
(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.
(d) For the purposes of this section the following words or phrases shall have the meaning indicated:
(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;
(2) the degree of relationship is calculated according to the civil law system;
(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;
(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;
(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;
(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;
(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.
(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.
(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was

assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

28 USC 994(p):
Duties of the Commission

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(p) The Commission, at or after the beginning of a regular session of Congress, but not later than the first day of May, may promulgate under subsection (a) of this section and submit to Congress amendments to the guidelines and modifications to previously submitted amendments that have not taken effect, including modifications to the effective dates of such amendments. Such an amendment or modification shall be accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted, except to the extent that the effective

date is revised or the amendment is otherwise modified or disapproved by Act of Congress.

USSG § 2D1.1:
Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy
(a) Base Offense Level (Apply the greatest):

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(9) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by 2 levels.[Subsection
(c) (Drug Quantity Table):

Controlled Substances and Quantity*	Base Offense Level
(14) • Less than 5 G of Heroin (or the equivalent amount of other Schedule I or II Opiates); • Less that 25 G of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 12

USSG § 2S1.1:
Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity
(a) Base Offense Level:

(1) The offense level for the underlying offense from which the laundered funds were derived, if (A) the defendant committed the underlying offense (or would be accountable for the underlying offense under subsection (a)(1)(A) of §1B1.3 (Relevant Conduct)); and (B) the offense level for that offense can be determined; or

(2) 8 plus the number of offense levels from the table in §2B1.1 (Theft, Property Destruction, and Fraud) corresponding to the value of the laundered funds, otherwise.

(b) Specific Offense Characteristics

(1) If (A) subsection (a)(2) applies; and (B) the defendant knew or believed that any of the laundered funds were the proceeds of, or were intended to promote (i) an offense involving the manufacture, importation, or distribution of a controlled substance or a listed chemical; (ii) a crime of violence; or (iii) an offense involving firearms, explosives, national security, or the sexual exploitation of a minor, increase by **6** levels.

(2) (Apply the Greatest):

(A) If the defendant was convicted under 18 U.S.C. § 1957, increase by **1** level.

(B) If the defendant was convicted under 18 U.S.C. § 1956, increase by **2** levels.

(C) If (i) subsection (a)(2) applies; and (ii) the defendant was in the business of laundering funds, increase by 4 levels.

(3) If (A) subsection (b)(2)(B) applies; and (B) the offense involved sophisticated laundering, increase by 2 levels.

USSG § 3D:
Part D-Multiple Counts

§3D1.1. Procedure for Determining Offense Level on Multiple Counts

(a) When a defendant has been convicted of more than one count, the court shall:
(1) Group the counts resulting in conviction into distinct Groups of Closely Related Counts ("Groups") by applying the rules specified in §3D1.2.
(2) Determine the offense level applicable to each Group by applying the rules specified in §3D1.3.
(3) Determine the combined offense level applicable to all Groups taken together by applying the rules specified in §3D1.4.

(b) Exclude from the application of §§3D1.2-3D1.5 the following:

(1) Any count for which the statute (A) specifies a term of imprisonment to be imposed; and (B) requires that such term of imprisonment be imposed to run consecutively to any other term of imprisonment. Sentences for such counts are governed by the provisions of §5G1.2(a).

(2) Any count of conviction under 18 U.S.C. § 1028A. See Application Note 2(B) of the Commentary to §5G1.2 (Sentencing on Multiple Counts of Conviction) for guidance on how sentences for multiple counts of conviction under 18 U.S.C. § 1028A should be imposed.

§3D1.2. Groups of Closely Related Counts

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) When counts involve the same victim and the same act or transaction.

(b) When counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) When the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Offenses covered by the following guidelines are to be grouped under this subsection:

§§2B1.1, 2B1.4, 2B1.5, 2B4.1, 2B5.1, 2B5.3, 2B6.1;
§§2C1.1, 2C1.2, 2C1.8;
§§2D1.1, 2D1.2, 2D1.5, 2D1.11, 2D1.13;
§§2E4.1, 2E5.1;
§§2G2.2, 2G3.1;
§2K2.1;
§§2L1.1, 2L2.1;
§2N3.1;
§2Q2.1;
§2R1.1;
§§2S1.1, 2S1.3;
§§2T1.1, 2T1.4, 2T1.6, 2T1.7, 2T1.9, 2T2.1, 2T3.1.

Specifically excluded from the operation of this subsection are:

all offenses in Chapter Two, Part A;
§§2B2.1, 2B2.3, 2B3.1, 2B3.2, 2B3.3;
§2C1.5;
§§2D2.1, 2D2.2, 2D2.3;
§§2E1.3, 2E1.4, 2E2.1;
§§2G1.1, 2G2.1;
§§2H1.1, 2H2.1, 2H4.1;
§§2L2.2, 2L2.5;
§§2M2.1, 2M2.3, 2M3.1, 2M3.2, 2M3.3, 2M3.4, 2M3.5, 2M3.9;
§§2P1.1, 2P1.2, 2P1.3;
§2X6.1.

For multiple counts of offenses that are not listed, grouping under this subsection may or may not be appropriate; a case-by-case determination must be

made based upon the facts of the case and the applicable guidelines (including specific offense characteristics and other adjustments) used to determine the offense level.

Exclusion of an offense from grouping under this subsection does not necessarily preclude grouping under another subsection.

§3D1.3. Offense Level Applicable to Each Group of Closely Related Counts

Determine the offense level applicable to each of the Groups as follows:

(a) In the case of counts grouped together pursuant to §3D1.2(a)-(c), the offense level applicable to a Group is the offense level, determined in accordance with Chapter Two and Parts A, B, and C of Chapter Three, for the most serious of the counts comprising the Group, i.e., the highest offense level of the counts in the Group.

(b) In the case of counts grouped together pursuant to §3D1.2(d), the offense level applicable to a Group is the offense level corresponding to the aggregated quantity, determined in accordance with Chapter Two and Parts A, B and C of Chapter Three. When the counts involve offenses of the same general type to which different guidelines apply, apply the offense guideline that produces the highest offense level.

3D1.4. Determining the Combined Offense Level

The combined offense level is determined by taking the offense level applicable to the Group with the

highest offense level and increasing that offense level by the amount indicated in the following table:

Number of Units	Increase in Level
1	none
1 ½	add 1 level
2	add 2 levels
2 1/2 - 3	add 3 levels
3 1/2 - 5	add 4 levels
More than 5	add 5 levels.

In determining the number of Units for purposes of this section:

(a) Count as one Unit the Group with the highest offense level. Count one additional Unit for each Group that is equally serious or from 1 to 4 levels less serious.

(b) Count as one-half Unit any Group that is 5 to 8 levels less serious than the Group with the highest offense level.

(c) Disregard any Group that is 9 or more levels less serious than the Group with the highest offense level. Such Groups will not increase the applicable offense level but may provide a reason for sentencing at the higher end of the sentencing range for the applicable offense level.

3D1.5. Determining the Total Punishment
Use the combined offense level to determine the appropriate sentence in accordance with the provisions of Chapter Five.

USSG § 5C1.1(e):
§5C1.1. Imposition of a Term of Imprisonment
(e) Schedule of Substitute Punishments:
(1) One day of intermittent confinement in prison or jail for one day of imprisonment (each 24 hours of confinement is credited as one day of intermittent confinement, provided, however, that one day shall be credited for any calendar day during which the defendant is employed in the community and confined during all remaining hours);
(2) One day of community confinement (residence in a community treatment center, halfway house, or similar residential facility) for one day of imprisonment;
(3) One day of home detention for one day of imprisonment.

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7th Circuit Operating Procedure
6. Panel Assignments in Certain Cases
(b) *Successive Appeals*. Briefs in a subsequent appeal in a case in which the court has heard an earlier appeal will be sent to the panel that heard the prior appeal. That panel will decide the successive appeal on the merits unless there is no overlap in the issues

presented. When the subsequent appeal presents different issues but involves the same essential facts as the earlier appeal, the panel will decide the subsequent appeal unless it concludes that considerations of judicial economy do not support retaining the case. If the panel elects not to decide the new appeal, it will return the case for reassignment at random. If the original panel retains the successive appeal, it will notify the circuit executive whether oral argument is necessary. If oral argument is scheduled, any visiting judge will be replaced by a member of this court designated by lot. Cases that have been heard by the court en banc are outside the scope of this procedure, and successive appeals will be assigned at random unless the en banc court directs otherwise.